158-51

# TRANSCRIPT OF RECORD.

## SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

No. ~~1085.~~ 613

HERMAN SPARF AND HANS HANSON, PLAINTIFFS IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.

FILED DECEMBER 19, 1893.

(15469.)

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1 *Indictment.*

UNITED STATES OF AMERICA.

In the district court of the United States for the northern district of California.

At a stated term of said court, begun and holden at the city and county of San Francisco, within and for the northern district of California, on the first Monday of February, in the year of our Lord one thousand eight hundred and ninety-three.

The grand jurors of the United States of America within and for the northern district of California upon their oath present that—

Thomas St. Clair, Herman Sparf, and Hans Hanson, mariners, late of the northern district of California, heretofore, to wit, on the thirteenth day of January, in the year of our Lord one thousand eight hundred and ninety-three, with force and arms, on the high seas, and within the jurisdiction of this court, and within the admiralty and maritime jurisdiction of the said United States of America, and out of the jurisdiction of any particular State of the said United States of America, in and on board of a certain American vessel, the same then and there being a bark called and named the Hesper, then and there belonging to a citizen or citizens of the said United States of America, whose name or names is or are to the grand jurors aforesaid unknown, in and upon one Maurice Fitzgerald, then and there being on board said vessel, did piratically, willfully, feloniously, and of malice aforethought make an assault; and that the

2 said Thomas St. Clair, Herman Sparf, and Hans Hanson, with a certain instrument or weapon (the character and name of which are to the grand jurors aforesaid unknown), then and there held in the hands of one of said persons, viz, Thomas St. Clair, Herman Sparf, and Hans Hanson (but of which particular one is to the grand jurors aforesaid unknown), the said Thomas St. Clair, Herman Sparf, and Hans Hanson, in and upon the head of him, the said Maurice Fitzgerald, and upon other parts of his body (to the grand jurors aforesaid unknown), did then, to wit, on the said thirteenth day of January, in the year of our Lord one thousand eight hundred and ninety-three, and there, to wit, on the high seas, as aforesaid, in and on board of the said American vessel and on the high seas, as aforesaid, and within the admiralty and maritime jurisdiction of the said United States of America, and within the jurisdiction of this court, and out of the jurisdiction of any particular State of the said United States of America, then and there piratically, willfully, feloniously, and with malice aforethought strike and beat the said Maurice Fitzgerald, then and there giving to the said Maurice Fitzgerald several grievous, dangerous, and mortal wounds, and did then and there, to wit, at the time and place last above mentioned, him, the said Maurice Fitzgerald, cast and throw from and out of the said vessel into the sea, and plunge, sink, and drown him, the said Maurice Fitzgerald, in the sea aforesaid, of which said mortal wounds, casting, throwing, plunging, sinking, and drowning, the said Maurice Fitzgerald, in and upon the high seas aforesaid, out of the jurisdiction of any particular State of the United States of America, then

and there instantly died; and the grand jurors aforesaid, upon
3 their oath aforesaid, do say that by reason of the casting and throwing the said Maurice Fitzgerald in the sea, aforesaid, they can not describe the said mortal wounds, or the character and nature of said weapon or instrument.

And so the grand jurors aforesaid, upon their oath aforesaid, do say, that the said Thomas St. Clair, Herman Sparf, and Hans Hanson, him, the said Maurice Fitzgerald, at the time and place as aforesaid, upon the high seas as aforesaid, out of the jurisdiction of any particular State of the United States of America, in and upon the said American vessel, within the jurisdiction of the United States of America and of the admirality and maritime jurisdiction of the said United States and of this court, in the manner and form aforesaid, piratically, willfully, feloniously, and with malice aforethought did kill and murder, against the peace and dignity of the United States of America, and contrary to the form of the statute of the said United States of America in such case made and provided.

And the grand jurors aforesaid, upon their oath aforesaid, do further find and present, that the northern district of California, of the United States of America, is the district into which the said Thomas St. Clair, Herman Sparf, and Hans Hanson were first brought after committing said offense.

CHAS. A. GARTER,
*United States Attorney.*

Names of witnesses examined before the said grand jury, on finding the foregoing indictment: F. O. Sodergren, John Lucas, Pandy Zacaria, Thomas Green, John Jens Olsen, H. Westerling, Ah Hong, John Langlais.

4 (Endorsed:) No. 2929. United States district court, northern district of California. The United States of America *vs.* Thomas St. Clair, Herman Sparf, and Hans Hanson. Indictment, for murder of Maurice Fitzgerald, on board American bark "Hesper." A true bill. E. J. Bowen, foreman. Presented and filed in open court, this 5th day of May, A. D. 1893. Southard Hoffman, by J. S. Manley, deputy clerk. Charles A. Garter, United States attorney.

5 *Order remitting case.*

At a stated term of the district court of the United States of America for the northern district of California, held at the court room in the city of San Francisco, on Friday, the 5th day of May, in the year of our Lord one thousand eight hundred and ninety-three. Present, the honorable Wm. W. Morrow, judge.

THE UNITED STATES OF AMERICA
*vs.*
THOMAS ST. CLAIR, HERMAN SPARF, AND HANS HANSON. } No. 2929.

On motion of Charles A. Garter, esquire, United States attorney, it is by the court now here ordered that the indictment found against the defendants above named, now on file in this court, be remitted to the next session of the circuit court of the United States, ninth circuit, and northern district of California, for trial.

I hereby certify that the foregoing is a full, true, and correct copy of an original order made and entered in the above-entitled case.

Attest my hand and seal of said district court, this 5th day of May, A. D. 1893.

[SEAL.] SOUTHARD HOFFMAN,
*Clerk.*

By J. S. MANLEY,
*Deputy Clerk.*

6 *Certificate of clerk to remitted record.*

United States district court, northern district of California.

THE UNITED STATES OF AMERICA
*vs.*
THOMAS ST. CLAIR, HERMAN SPARF, AND Hans Hanson.

I, Southard Hoffman, clerk of the district court of the United States for the northern district of California, do hereby certify that at a stated term of the United States district court for the northern district of California, to wit, the February, 1893, term thereof, it was by the said court ordered that the indictment No. 2929, found against the defendants above named, be remitted to the next session of the United States circuit court for the ninth circuit and northern district of California; and in pursuance of said order, I do hereby certify the annexed indictment to be an original indictment found against said defendants above named, and I do remit the same to the said circuit court of the United States for the ninth circuit and northern district of California.

In witness whereof I have hereunto set my hand and affixed the seal of said district court, this 6th day of May, A. D. 1893.

[SEAL.] SOUTHARD HOFFMAN,
*Clerk U. S. District Court, Northern District of California.*

7 (Endorsed:) No. 2173. U. S. circuit court, northern district of California. The United States of America vs. Thomas St. Clair et al. Record remitted from U. S. district court. Filed May 6, 1893, L. S. B. Sawyer, clerk.

8 *Order arraigning prisoners, &c.*

At a stated term, to wit, the February term, A. D. 1893, of the circuit court of the United States of America of the ninth judicial circuit, in and for the northern district of California, held at the court-room in the city and county of San Francisco, on Wednesday, the 10th day of May, in the year of our Lord one thousand eight hundred and ninety-three. Present, the honorable Joseph McKenna, circuit judge.

THE UNITED STATES OF AMERICA
*vs.*
THOMAS ST. CLAIR, HERMAN SPARF, AND Hans Hanson.
No. 2173. Indictment for murder on the high seas, &c.

Indictment remitted from the United States district court for the northern district of California.

And now comes Charles A. Garter, esq., United States attorney, and moves the court that the prisoners, Thomas St. Clair, Herman Sparf, and

Hans Hanson, present in open court, be arraigned to plead. The said prisoners, being asked by the court if they had counsel, replied that they had not, and had no means with which to employ counsel, and that they desire the court to appoint some attorney of the court to act as counsel for them. The court thereupon appointed F. J. Kierce, esq., to act as their counsel for the purposes of this arraignment. The said prisoners
9 were thereupon arraigned, and the indictment having been read to them they were each asked if they pleaded guilty or not guilty. They each thereupon individually and by their counsel replied that they were not guilty. On motion of F. J. Kierce, esq., said prisoners were allowed till Wednesday, the 17th inst., at 10:30 a. m., to withdraw their several pleas if they or either of them should be so advised.

10 *Order continuing trial.*

At a stated term, to wit, the February term, A. D. 1893, of the circuit court of the United States of America of the ninth judicial circuit, in and for the northern district of California, held at the court-room in the city and county of San Francisco, on Wednesday, the 17th day of May, in the year of our Lord one thousand eight hundred and ninety-three. Present, the honorable Joseph McKenna, circuit judge.

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| THE UNITED STATES OF AMERICA, *vs.* THOMAS ST. CLAIR, HERMAN SPARF, AND Hans Hanson. | No. 2173. Indictment for murder on the high seas, &c. |

Indictment remitted from the United States district court for the northern district of California.

By consent of counsel, Charles A. Shurtleff, esq., assistant United States attorney for the United States, and F. J. Kierce, esq., for the prisoners, it is ordered that this cause be and the same hereby is continued to Monday, the 22d inst., at eleven o'clock a. m.

11 *Order appointing counsel for prisoners, &c.*

At a stated term, to wit, the February term, A. D. 1893, of the circuit court of the United States of America of the ninth judicial circuit, in and for the northern district of California, held at the court-room in the city and county of San Francisco, on Monday, the 22d day of May, in the year of our Lord one thousand eight hundred and ninety-three. Present, the honorable Joseph McKenna, circuit judge.

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| THE UNITED STATES OF AMERICA *vs.* THOMAS ST. CLAIR ET AL. | No. 2173. Indictment for murder on the high seas, &c. |

Charles A. Garter, esq., United States attorney, being present, and the prisoners, Thomas St. Clair, Herman Sparf, and Hans Hanson, being present in open court, it is ordered that F. J. Kierce and J. F. Smith, esqs., act as counsel for said prisoners. It is further ordered that the time within which the pleas of said prisoners may be withdrawn be extended to Wednesday next, the 24th inst.

12 *Demurrer.*

In the circuit court of the United States, northern district of California.

UNITED STATES OF AMERICA, PLAINTIFF,
*vs.*
THOMAS ST. CLAIR, HERMAN SPARF, AND HANS HANSON, DEFENDANTS.

The above-named defendants, and each of them, now come and demur to the indictment on file against them in this court charging them with murder, upon the ground that the same does not state facts constituting a public offense.

2. That the said indictment is uncertain in this:

(a) It fails to show upon what portion of the high seas the alleged offense attempted to be charged in the indictment was committed.

(b) It fails to show which one of the defendants, if any, committed the alleged assault attempted to be charged in the indictment; it also fails to show whether one or more of the defendants committed any of the acts charged against them in the indictment.

J. F. SMITH &
F. J. KIERCE,
*Attorneys for Defendants.*

(Endorsed:) Filed May 24, 1893. L. S. B. Sawyer, clerk.

13 *Order overruling demurrer and plea of defendants.*

At a stated term, to wit, the February term, A. D. 1893, of the circuit court of the United States of America, of the ninth judicial circuit, in and for the northern district of California, held at the court room in the city and county of San Francisco, on Wednesday, the 24th day of May, in the year of our Lord one thousand eight hundred and ninety-three. Present, the honorable Joseph McKenna, circuit judge.

THE UNITED STATES OF AMERICA,
*vs.*
THOMAS ST. CLAIR ET AL.
No. 2173. Indictment for murder on the high seas, &c.

Charles A. Garter, esq., United States attorney, appearing on behalf of the United States, and the prisoners, Thomas St. Clair, Herman Sparf, and Hans Hanson, being present in open court in person, and F. J. Kierce, esq., one of their counsel, the said prisoners withdrew their plea of not guilty and file a demurrer to the indictment herein. Said demurrer was thereupon argued by the respective counsel and submitted to the court for consideration and decision. And the same having been duly considered, it is ordered that said prisoners, Thomas St. Clair, Herman Sparf, and Hans Hanson, thereupon were again arraigned, and each having been asked if he pleaded guilty or not guilty, replied that he pleaded not guilty. It is ordered that said prisoners be remanded to the custody of the
14 United States marshal for the northern district of California, to await trial on the 14th day of June next.

15 *Minutes of trial.*

At a stated term, to wit, the July term, A. D. 1893, of the circuit court of the United States of America, of the ninth judicial circuit, in and for the northern district of California, held at the court room in the city and county of San Francisco, on Tuesday, the 15th day of August, in the year of our Lord one thousand eight hundred and ninety-three. Present, the honorable Joseph McKenna, circuit judge.

THE UNITED STATES OF AMERICA *vs.* HERMAN SPARF AND HANS HANSON. } No. 2173. Indictment for murder on the high seas, &c.

The issue joined between the United States of America and the prisoners at the bar, Herman Sparf and Hans Hanson, came on this day for trial, Charles A. Garter, esq., United States attorney, appearing for the United States and James F. Smith and F. J. Kierce, esqs., appearing for said prisoners. Thereupon, on motion of Charles A. Garter, esq., United States attorney, and by consent of counsel for the defendants, Herman Sparf and Hans Hanson, it is ordered that the order heretofore made herein directing that said defendants to be tried separately be, and the same hereby is, set aside and vacated, and that said defendants, Herman Sparf and Hans Hanson, be tried jointly.

16 Counsel for the said defendants then interposed a challenge to the entire venire of trial jurors summoned for the present term, on the ground that at the beginning of said term there were not three hundred names of jurors placed in the jury box, but at that time about one hundred and sixty names were added to the names then in the box to make up the number of three hundred; that at the beginning of the term three hundred names were not in said box, and that three hundred names were never placed therein, but an additional one hundred and sixty names only were placed in the box, to make up the full three hundred. And said challenge having been submitted to the judge for consideration and decision, and the same having been duly considered, it is ordered that said challenge be, and the same hereby is, denied. The impanelment of the jury herein then commenced. Upon calling twelve jurors to the jury box, counsel for said defendants interposed a challenge to the panel, which, on being submitted to the court for consideration and decision, was denied. Counsel for said defendants challenged the following-named jurors: A. S. Baldwin, Edward Fanning, Joseph Coblentz, John P. Riordan, and Charles Alpers, who were challenged for cause. Said challenge was thereupon denied by the court, and said jurors were excused. Thereupon Reuben Kalisky and R. D. Childs were excused, they not being on any assessment roll in said northern district of California. The United States attorney challenged S. J. Cunningham, Charles Caro, Charles W. Sutro, and P. S. Fay for cause. Said challenge not being denied said jurors were excused. The following-named jurors were challenged peremptorily by counsel for said defendants: A. S. Baldwin, P. H. Norton,

17 John P. Riordan, E. P. McKnew, and J. J. Gray. Thereupon the United States attorney challenged Edward Fanning, Enoch L. Lowe, peremptorily. Thereupon the following-named persons were duly

impaneled to try the issues herein: A. W. Starbird, John F. Cooney, James Duggan, Thomas P. Andrews, Alexander McLaughlin, Sherman T. Blake, E. J. Behre, William J. Ferguson, William H. Thomas, Abraham Lindenbaum, H. H. Woodruff, and John J. Haley, twelve good and lawful men taken by consent of the respective counsel, examined and sworn to well and truly try the issue joined herein, and a true verdict render according to the evidence. The further trial of this cause was then continued till to-morrow morning at 11 o'clock; the jury, having been admonished by the court, were allowed to separate until that time.

18 *Minutes of trial.*

At a stated term, to wit, the July term, A. D. 1893, of the circuit court of the United States of America, of the ninth judicial circuit, in and for the northern district of California, held at the court room in the city and county of San Francisco, on Wednesday, the 16th day of August, in the year of our Lord one thousand eight hundred and ninety-three. Present, the honorable Joseph McKenna, circuit judge.

THE UNITED STATES OF AMERICA *vs.* HERMAN SPARF AND HANS HANSON. } No. 2173. Indictment for murder on the high seas, &c.

Charles A. Garter, esq., United States attorney, and James F. Smith and F. J. Kierce, esqs., counsel for defendants herein, and said defendants Herman Sparf and Hans Hanson, and the jury present in open court, the trial of this cause was resumed. Thereupon the indictment herein is read by the clerk to the jury and the plea of defendants stated to the jury. F. O. Sodergren was then sworn and examined as a witness on behalf of the United States. It is ordered that the further trial hereof be continued till 11 o'clock a. m. to-morrow. Before adjournment the court admonished the jury herein and the members thereof were allowed to separate until to-morrow at 11 o'clock a. m.

19 *Minutes of trial.*

At a stated term, to wit, the July term A. D. 1893, of the circuit court of the United States of America, of the ninth judicial circuit, in and for the northern district of California, held at the court room in the city and county of San Francisco, on Thursday, the 17th day of August, in the year of our Lord one thousand eight hundred and ninety-three. Present, the honorable Joseph McKenna, circuit judge.

THE UNITED STATES OF AMERICA *vs.* HERMAN SPARF AND HANS HANSON. } No. 2173. Indictment for murder on the high seas, &c.

Counsel, Charles A. Garter, esq., United States attorney, and James F. Smith and F. J. Kierce, esqs., for defendants herein, and said defendants Herman Sparf and Hans Hanson, and the jury present in open court, and the trial of this cause was resumed.

Thereupon the following-named persons were sworn and examined as witnesses on behalf of the United States: F. O. Sodergren (recalled), John Lucas, and Edward Larsen. It is ordered that the further trial of this cause be continued to-morrow forenoon at 11 o'clock. The jury having been admonished by the court were allowed to separate until that time.

20 *Minutes of trial.*

At a stated term, to wit, the July term A. D. 1893, of the circuit court of the United States of America, of the ninth judicial circuit, in and for the northern district of California, held at the court room in the city and county of San Francisco, on Friday, the 18th day of August, in the year of our Lord one thousand eight hundred and ninety-three. Present, the honorable Joseph McKenna, circuit judge.

THE UNITED STATES OF AMERICA *vs.* HERMAN SPARF AND HANS HANSON. } No. 2173. Indictment for murder on the high seas, &c.

The counsel, Charles A. Garter, esq., United States attorney, and James F. Smith and F. J. Kierce, esqs., for defendants herein, and said defendants Herman Sparf and Hans Hanson, and the jury present in open court, and the trial of this cause was resumed. Thereupon Edward Larsen was recalled and examined as a witness for the United States and Thomas Green was sworn and examined as a witness for the United States. After the jury was admonished by the court the further trial of this cause was continued until Tuesday, the 22d instant, at 11 o'clock a. m.

21 *Minutes of trial.*

At a stated term, to wit, the July term A. D. 1893, of the circuit court of the United States of America, of the ninth judicial circuit, in and for the northern district of California, held at the court room in the city and county of San Francisco, on Tuesday, the 22d day of August, in the year of our Lord one thousand eight hundred and ninety three. Present, the honorable Joseph McKenna, circuit judge.

THE UNITED STATES OF AMERICA *vs.* HERMAN SPARF AND HANS HANSON. } No. 2173. Indictment for murder on the high seas, &c.

The counsel, Charles A. Garter, esq., United States attorney, and James F. Smith and F. J. Kierce, esqs., for defendants Herman Sparf and Hans Hanson, and the jury herein were present in open court and the trial of this cause was resumed; thereupon the following-named persons were sworn and examined as witnesses for the United States: Thomas Green (recalled) F. O. Sodergren (recalled) and M. P. Luck. The jury were admonished by the court and the trial of this cause was continued till 11 o'clock a. m. to-morrow.

22 *Minutes of trial.*

At a stated term, to wit, the July term, A. D. 1893, of the circuit court of the United States of America, of the ninth judicial circuit, in and for the northern district of California, held in the court room in the city and county of San Francisco, on Wednesday, the 23d day of August, in the year of our Lord one thousand eight hundred and ninety-three. Present, the honorable Joseph McKenna, circuit judge.

THE UNITED STATES OF AMERICA } No. 2173. Indictment for mur-
*vs.* der on the high seas, &c.
HERMAN SPARF AND HANS HANSON. }

The counsel, Charles A. Garter, esq., United States attorney, James F. Smith and F. J. Kierce, esqrs., for the defendants Herman Sparf and Hans Hanson, and the jury herein were present in open court, and the trial of this cause was resumed. Thereupon the following-named persons were sworn and examined as witnesses for the United States: Mrs. F. O. Sodergren, Edward Larson, Pandy Zacaria, H. Westerling, Ah Hong, John Langlais, John Olsen, Thos. Green, Thos. Price, H. W. Baker, and W. J. Coey, and the United States rests. Thereupon F. O. Sodergren and Mrs. F. O. Sodergren were sworn and examined as witnesses for the defendants and said defendants rest. It is ordered that the further trial of this cause be, and the same hereby is continued to 10 o'clock
23 a. m. to-morrow, and the jury herein was excused until that time.

24 *Minutes of trial.*

At a stated term, to wit, the July term, A. D. 1893, of the circuit of the United States of America, of the ninth judicial circuit, in and for the northern district of California, held at the court-room in the city and county of San Francisco, on Thursday the 24th day of August, in the year of our Lord one thousand eight hundred and ninety-three. Present, the honorable Joseph McKenna, circuit judge.

THE UNITED STATES OF AMERICA } No. 2173. Indictment for mur-
*vs.* der on the high seas, &c.
HERMAN SPARF AND HANS HANSON. }

The counsel for the United States and James F. Smith and F. J. Kierce, esqs., for the defendants, Herman Sparf and Hans Hanson, and the jury herein, were present in open court and the trial of this cause was resumed. Thereupon the evidence being closed Charles A. Garter, United States attorney, commenced his argument. It is ordered that the trial of this cause be and the same hereby is continued till 10 o'clock a. m. to-morrow. The jury having been admonished by the court, were allowed to separate until that time.

25 *Minutes of trial and verdict.*

At a stated term, to wit, the July term, A. D. 1893, of the circuit court of the United States of America, of the ninth judicial circuit, in and for the northern district of California, held at the court room in the city and county of San Francisco, on Friday, the 25th day of August, in the year of our Lord one thousand eight hundred and ninety-three. Present, the honorable Joseph McKenna, circuit judge.

THE UNITED STATES OF AMERICA
*vs.*
HERMAN SPARF AND HANS HANSON. } No. 2173. Indictment for murder on the high seas, &c.

Now comes Charles A. Garter, esq., United States attorney, with the defendants, Herman Sparf and Hans Hanson and their counsel, James F. Smith and F. J. Kierce, esqs., and the jury impannelled to try this issue being called by the clerk of the court, answered to their names. Counsel thereupon proceeded with the argument of the cause; the jury having heard the same and the instructions of the court, retired in charge of the United States marshal (who was duly instructed by the court) to deliberate upon a verdict; they subsequently returned into court, and upon being called all answered to their names, when the following proceedings were had:

COURT. Gentlemen, have you agreed upon a verdict?

26 FOREMAN. No, sir; we desire further instructions. The court thereupon further instructed the jury and they again retired for deliberation. Subsequently the jury was returned into court and upon being called, all answered to their names, and thereupon the following proceedings were had:

CLERK. Gentlemen of the jury, have you agreed upon a verdict?

FOREMAN. We have.

CLERK. Defendants please rise; gentlemen of the jury, please rise; defendants, look upon the jury; gentlemen of the jury, look upon the defendants; what say you, gentlemen of the jury, are the defendants guilty or not guilty?

FOREMAN. Guilty.

Thereupon the foreman read and presented to the clerk the verdict in the following language:

U. S. circuit court, ninth judicial circuit, northern district of California.

THE UNITED STATES OF AMERICA
*vs.*
HERMAN SPARF AND HANS HANSON. } Criminal. No. 2173.

We, the jury, find the defendants guilty of murder.

JNO. J. HALEY,
*Foreman.*

Which said verdict was duly recorded and read to the jury. Whereupon the clerk asked, "Gentlemen of the jury, is that your verdict?" To which they all replied, "It is."

Thereupon, on motion of defendants' attorney, the jury was polled, the clerk asking each juror separately and by name, is this your ver-
27 dict? To which each juror separately replied, "It is." The jury was then discharged.

On motion of defendants' attorneys it is ordered that Monday, Sept. 11th, A. D. 1893, at 11 o'clock a. m. be, and hereby is set for pronouncing sentence on the said defendants.

28 *Order continuing time for passing sentence.*

At a stated term, to wit, the July term, A. D. 1893, of the circuit court of the United States of America, of the ninth judicial circuit, in and for the northern district of California, held at the court room in the city and county of San Francisco, on Monday, the 11th day of September, in the year of our Lord one thousand eight hundred and ninety-three. Present, the honorable Joseph McKenna, circuit judge.

THE UNITED STATES OF AMERICA
*vs.*
HERMAN SPARF AND HANS HANSON. } No. 2173.

On motion of F. J. Kierce, esq., of counsel for defendants, Herman Sparf and Hans Hanson, who were present in open court, and by consent of Charles A. Garter, esq., United States attorney, it is ordered that the time to impose sentence on said defendants be, and the same hereby is, continued one week to September 18th, 1893.

29 *Charge to the jury.*

In the circuit court of the United States in and for the ninth circuit, northern district of California. The Hon. Joseph McKenna, judge.

THE UNITED STATES
*vs.*
HERMAN SPARF AND HANS HANSON.

FRIDAY, *August* 25, 1893.

*Charge to the jury.*

The COURT. Gentlemen of the jury: This case is now about to be submitted to your consideration, and in that consideration the principles of law are as much an element as are the facts of the case; hence I invite your careful attention to the instructions I am about to give you.

The indictment is based upon section 5339 of the Revised Statutes, which provides, among other things, that "every person who commits murder upon the high seas or in any arm of the sea, or in any river, haven, creek, basin, or bay, within the admiralty and maritime jurisdiction
30 of the United States, and out of the jurisdiction of any particular State, or who upon any such waters maliciously strikes, stabs,

wounds, poisons, or shoots any other person, or which striking, stabbing, wounding, poisoning, or shooting such other person dies on land or at sea, within or without the United States, shall suffer death.

The indictment charges that the defendants, Hans Hanson and Herman Sparf and Thomas St. Clair, on the 13th day of January, 1893, on the high seas, on the bark "Hesper," and within the admiralty jurisdiction of the United States, did kill and murder one Morris Fitzgerald.

To establish the offence charged in the indictment certain facts must therefore be proven by the prosecution with the strength of proof I shall hereafter define to you. These facts are that Morris Fitzgerald is dead; that he was killed on the high seas, on the bark "Hesper," in the manner and form described in the indictment, by the defendants, either alone or in combination with Thomas St. Clair. It must also be proved, with the same degree I have indicated, that the bark "Hesper" was an American ship, sailing under the American flag, and that San Francisco was the first American port to which the defendants were brought after such killing.

These facts being shown, it will be necessary to establish also, with the strength of proof I have indicated, that the killing was a murder.

What, then, is murder? There are only two kinds of felonious homicide known to the laws of the United States. One is murder and the other is manslaughter. There are no degrees of murder. I men-
31 tion this fact, gentlemen, lest your experience on State juries with the State law would lead you to confusion. Nor is it the province of a jury in the United States courts to fix the punishment for murder. That is fixed by the law, as I have already read to you, by death. The jury's province is to pass on the facts of the case, not to fix any sentence as under the State law.

There is no definition of murder by any United States statute. We resort to the common law for that.

By common law, murder is the unlawful killing of a human being in the peace of the State, with malice aforethought, either express or implied.

Malice, then, is an element in the offense, and discriminates it from the other crime of felonious homicide which I have mentioned, to wit, manslaughter; that is, malice, express or implied, discriminates murder from the offense of manslaughter.

What is malice? It is not easy to define it in terms simpler than itself. It is somewhat technical in law, and is said to be expressed or implied. These terms, however, as Justice Field has observed, do not indicate different states of mind, but the same state of mind. The difference is one of proof, not of kind. Express malice exists when one by deliberate premeditation and design, formed in advance, to kill or to do bodily harm, the premeditation and design being implied from external circumstances capable of proof, such as lying in wait, antecedent threats, and concerted schemes against a victim.

Implied malice is an inference of the law from any deliberate and cruel act committed by one person against another. The two kinds of
32 malice, therefore, to repeat, indicate but one state of mind established in different ways, the one by circumstances showing premeditation of the homicide, the other by an inference of the law from the act committed; that is, malice is inferred when one kills another without provocation, or when the provocation is not great.

Manslaughter is the unlawful killing of a human being without malice, either expressed or implied.

I do not consider it necessary, gentlemen, to explain it further; for, if a felonious homicide has been committed, of which you are to be the judges from the proof, there is nothing in this case to reduce it below the grade of murder. In other words, it may be in the power of the jury, under the indictment by which these defendants are accused and tried, of finding them guilty of a less crime than murder, to wit, manslaughter, or an attempt to commit murder; yet, as I have said in this case, if a felonious homicide has been committed at all, of which, I repeat, you are the judges, there is nothing to reduce it below the grade of murder.

The law devolves certain duties on the prosecution in in a criminal case, clothes the defendant with certain presumptions, and requires a certain strength of proof of his guilt. For instance, the law does not require the defendant to prove himself innocent. It imposes the burthen on the prosecution to prove him guilty. In other words, the law presumes that each defendant is innocent, and this presumption should continue and prevail in your minds until you are satisfied from the evidence beyond a reasonabe doubt of his guilt, and, acting on this presumption, you should acquit him, unless the evidence establishes his guilt beyond a reasonable doubt.

33 A reasonable doubt is that state of the mind which, after a full conclusion of all the evidence, leaves your minds in that condition that you can not say you feel an abiding faith, amounting to a moral certainty, from the evidence, that the defendant is guilty of the crime charged against him, or that either of the defendants is guilty of the crime charged against them.

In a case like this—a criminal case—the amount of proof required is different from the amount required in a civil case. In the latter, that is, in a civil case, a mere preponderance of evidence is necessary. In this case the proof must be beyond a reasonable doubt, as I have explained to you. Mere probabilities, therefore, are not sufficient, nor is it sufficient that upon the doctrine of chances that it is more probable that the defendant is guilty than not guilty. Nor should he be convicted on mere suspicion. The strength of proof must be such that it will exclude any reasonable theory upon which he can be innocent; and you must find a verdict from the testimony in the case, unaided, unassisted, and uninfluenced by any opinion, or presumption, not founded upon the testimony.

As a matter of law, where a conviction for a criminal offense is sought upon circumstantial evidence alone, the Government must not only show by a preponderance of evidence that the alleged facts and circumstances are true, but they must be such facts and circumstances as are incompatible, upon any reasonable hypothesis, with the innocence of the accused and incapable of explanation upon any reasonable hypothesis other

34 than the guilt of the accused. And in this case, if all the facts and circumstances relied on by the Government to secure a conviction can be reasonably accounted for upon any reasonable theory consistent with the innocence of the defendant, you should acquit him. When I say "defendant," I mean either of the defendants. I have adopted that form for convenience.

If there is any one single fact proved to your satisfaction, by a preponderance of evidence, which is inconsistent with his guilt, this is sufficient to raise a reasonable doubt and you should acquit him.

You are the exclusive judges of the credibility of the witnesses, and in judging of their credibility, you have a right to take into consideration their prejudices, motives, or feelings of revenge, if any such have been proven or shown, by the evidence in the case; if you believe from the evidence that any witness or witnesses have knowingly and willfully testified falsely as to any material fact or point, you are at liberty to disregard entirely the testimony of such witness or witnesses.

As to the statements made by the defendants or either of them, or by any other person in the hearing and presence of either, the same are to be received with care and caution, and besides being satisfied that the witness who testified to the statements, speaks truly, you must be satisfied that the witness could not be, or was not mistaken, as to the substance of the statement.

If you believe from the evidence that Edward Larsen or Thomas Green, or either of them, were accomplices with the defendants, in the
35 commission of the acts charged in the indictment, then I instruct you, that you are to act upon their testimony with great care and caution, and subject it to a careful examination in the light of all the other evidence in the case, and you ought further not to convict upon their testimony alone, unless you are satisfied beyond any reasonable doubt, of its truth.

If you believe from the evidence that the witnesses Edward Larsen and Thomas Green, or either of them, or any other person, were induced to become witnesses and testify, by any promises of immunity from punishment, or by any hope held out to them from anyone that it would go easier with them in case they would disclose who their confederates were, or in case they implicated some one else in the crime, you should take this into consideration in determining the weight to be given to their testimony, and it should be received with caution and scrutinized with care.

I further instruct you that the confessions of a prisoner out of court and in custody, made to persons having no authority to examine him should be acted upon and received by you with great care and caution. Proof may be too easily procured, words are often misreported through ignorance, inattention, or malice, and are extremely liable to misconstruction and are rarely sufficient to warrant conviction on account of the great danger of mistake, and the fact that the mind of the prisoner himself may be oppressed by the calamity of his situation or influenced by motives of hope or fear to make an untrue confession.

You are further instructed that the alleged confessions of the
36 defendants to the witnesses, Edward Larsen and Thomas Green, or to anyone else, are to be received with caution and scrutinized with care, and are to be considered in view of all the facts and circumstances of the case, and you are also to consider in weighing the confessions alleged to have been made by the defendants to them to consider the zeal if any has been shown by the witnesses to connect the defendants with the commission of the alleged offense either by reason of the disposition of the witnesses to rely on slight grounds of suspicion or by reason of any other motive which may be shown by the evidence.

In considering the weight to be given to the alleged confessions of the defendants you are to consider their condition at the time the alleged confessions were made, the fact that they had been charged with crime and

how they were confined in custody and you are the judges as to whether said confessions were voluntary or whether any inducements were held out to them by the captain or by any one else.

While the Revised Statutes of the United States provides that a person charged with crime may testify in his own behalf, he is under no obligation to do so, and the statute expressly declares that his *b*eglect to testify shall not create any presumption against him under any circumstances whatever.

At common law, every person present at a murder, willingly aiding or a*n*etting its perpetration, is guilty *o*r murder an*y* may be indicted and convicted as principal in the first degree.

Therefore if you believe, from the evidence under the instructions I have given you, that Morris Fitzgerald was killed, as charged in the
37 indictment, and that neither of the defendants did the act alone, but was present willingly aiding or abetting its perpetration, he is guilty as though he did the act alone. But, on the other hand, if the evidence fail to show beyond a reasonable doubt that either of the defendants was present, or if either was present, and he did not know that Fitzgerald was to be assaulted or killed, or did not willingly aid or abet his killing, you should acquit such defendant.

Gentlemen, I have given you these instructions as carefully as I could, avoiding all references to the testimony, but I do not wish to be misunderstood, and out of abundant caution I say further to you, in giving you these instructions, I may by accident have assumed facts to be proven; if so you must disregard the assumption. It is not my purpose nor is it my function to assume any fact to be proven, nor to suggest to you that any fact has been proven. You are the exclusive judges of the facts. No matter what assumption may appear during the course of the trial, in any ruling of mine, or what may appear in any one of these instructions, you are to take this case and consider it, and remember you are the tribunal to which the law has referred the case, and whose judgment the law wants on the case.

When you retire to your jury-room you will select one of your number foreman. After you have deliberated upon the case, and agreed upon a verdict, you will return into court. The form of your verdict will be, if you find the defendants guilty, "We, the jury, find the defendants guilty of murder." If you find them not guilty, your verdict will be, "We, the jury, find the defendants' not guilty," or if you find one guilty
38 and not the other, your verdict will be accordingly.

Mr. GARTER. I ask your honor to instruct the jury that they may find separate verdicts as to each one of the defendants, as, for instance, one guilty and the other not guilty.

The COURT. I have already done so. To avoid any misunderstanding, gentlemen, you may, under the evidence, fin*e* one of the defendants guilty, and the other not guilty. If you find one not guilty, your verdict will be in his favor. If you find both guilty, your verdict will be accordingly, or if you find both innocent, your verdict will be accordingly.

Mr. SMITH. We desire to except to the instruction on manslaughter; that is, with reference to the testimony in the case. If your honor has refused to give any instructions that we asked for, we except to the refusal. We except to your honor's not giving the third, fourth, and fifth instructions asked for.

The COURT. I think I have given them substantially. I hand you, gentlemen, these forms of verdict which are in accordance with the instructions of the court.

(The jury retired at 2 minutes of 3, and returned into court at 5:10 p. m.)

The COURT. Gentlemen of the jury, have you agreed upon a verdict?

The FOREMAN. There is one of us who wishes to be instructed by your honor as to certain points upon the question of United States marine laws in regard to murder on the high seas.

The COURT. The instruction which I gave you, gentlemen, in regard to the law upon which the indictment was based, was section 5339 of the Revised Statutes, which I will read to you again.

39 A JUROR. Your honor, I would like to know in regard to the interpretation of the laws of the United States in regard to manslaughter, as to whether the defendants can be found guilty of manslaughter, or that the defendants must be found guilty?

The COURT. I will read the section to you and see if that touches the proposition. The indictment is based upon section 5336, which provides, among other things, "That every person who commits murder upon the high seas, or in any arm of the sea, or in any river, haven, creek, basin, or bay within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State, or who, upon such waters, maliciously strikes, stabs, wounds, poisons, or shoots any other person, or which striking, stabbing, wounding, poisoning, or shooting such other person dies on land or at sea, within or without the United States, shall suffer death." Hence, that is the penalty of the offense described in the indictment.

I have given you the definition of murder. If you remember it you will connect it with these words: "Every person who commits murder upon the high seas, or in any arm of the sea, or in any river, haven," etc.

A JUROR. Are the two words "aiding" or "abetting" defined.

The COURT. The words "aiding or abetting" are not defined; but I have instructed you as to the legal effect of aiding and abetting, and this you should accept as law. If I have made an error there is a higher tribunal to correct it.

A JUROR. I am the spokesman for two of us. We desire to clearly understand the matter. It is a barrier in our mind to our deter-
40 mining the matter. The question arising amongst us is as to aiding and abetting. Furthermore, as I understand, it must be one thing or the other. It must be either guilty or not guilty.

The COURT. Yes; under the instructions I have given you. I will read them to you again, as to be careful and that you may understand:

Murder is the 'lawful killing of a human being in the peace of the State, with malice aforethought, either express or implied. I defined to you what malice was, and I assume you can recall my definition to your minds.

Manslaughter is the unlawful killing of a human being without malice, either express or implied. I do not consider it necessary to explain it further. If a felonious homicide has been committed by either of the defendants, of which you are to be the judges from the proof, there is nothing in this case to reduce it below the grade of murder.

A JUROR. Then, as I understand your honor clearly, there is nothing about manslaughter in this court?

The COURT. No; I do not wish to be so understood. A verdict must be based on evidence, and in a proper case a verdict for manslaughter may be rendered.

A JUROR. A crime committed on the high seas must have been murder, or can it be manslaughter?

The COURT. In a proper case it may be murder or it may be manslaughter, but in this case it can not be properly manslaughter. As I have said, if a felonious homicide has been committed the facts of the case do not reduce it below murder. Do not understand me to say that manslaughter or murder has been committed. That is for you gentlemen to determine from the testimony and the instructions I have given you. I will say to you gentlemen, any time you desire your supper or
41 dinner the marshal will take you to a place where you can obtain the same.

Mr. SMITH. We take an exception.

A JUROR. We have got to bring a verdict for either manslaughter or murder?

The COURT. Do not 'understand me. I have not said so.

The JUROR. I know you have not.

The COURT. I cannot direct you what conclusion to come to from the facts. I direct you only as to the law. A judgement on the facts is your province.

Mr. GARTER. May I ask the court to instruct this jury that in cases where persons are being tried upon a charge of murder, and the facts proven at their trial show that the defendants are guilty of manslaughter, under such an indictment they may find him guilty of manslaughter, as a general rule; but, however, if the facts show that the defendants have been guilty of murder, and that in this case there is no evidence tending to establish the crime or offence of manslaughter——

Mr. SMITH. It is the province of the jury.

The COURT. I have already so instructed the jury. I have endeavored to make myself understood.

A JUROR. If we bring in a verdict of guilty that is capital punishment?

The COURT. Yes.

A JUROR. Then there is no other verdict we can bring in except guilty or not guilty?

The COURT. In a proper case a verdict for manslaughter may be rendered, as the district attorney has stated; and even in this case
42 you have the physical power to do so, but as one of the tribunals of the country a jury is expected to be governed by law, and the law it should receive from the court.

A JUROR. There has been a misunderstanding amongst us. Now it is clearly interpreted to us, an' no doubt we can now agree on certain facts.

(The jury then retired at 5:25 p. m. and returned into court a 9 o'clock p. m.)

The CLERK. Gentlemen, have you agreed upon a verdict?

The FOREMAN. We have.

The CLERK. Defendants, face the jury. The jury, face the defendants. What say you, gentlemen of the jury, are the defendants guilty or not guilty?

The FOREMAN. Guilty.

The COURT. Read the verdict Mr. Foreman, from where you stand.

The FOREMAN. We, the jury, find the defendants guilty as charged. Signed John J. Haley.

The COURT. You had better read it again, Mr. Foreman?

The FOREMAN. We, the jury, find the defendants guilty as charged.

The COURT. Read it again; I think you have made a mistake.

The FOREMAN. I do not see very well. We, the jury, find the defendants guilty of murder.

The COURT. Record the verdict, Mr. Clerk.

The CLERK. Gentlemen of the jury, hear your verdict as it stands recorded: U. S. circuit court, ninth judicial circuit, northern district of California. The United States vs. Herman Sparf and Hans Hanson. Criminal, No. 2173: "We, the jury, find the defendants guilty of murder. John J. Haley, foreman." Is that your verdict, gentlemen?

43

The JURY. Yes.

The COURT. Do you desire the jury polled?

Mr. SMITH. Yes, sir.

(The clerk then polled the jury who declared the above to be their verdict.)

(Endorsed:) Filed Oct. 3, '93, W. J. Costigan, clerk.

44 *Order continuing sentence.*

At a stated term, to wit, the July term, A. D. 1893, of the circuit court of the United States of America of the ninth judicial circuit, in and for the northern district of California, held at the court room in the city and county of San Francisco, on Monday, the 11th day of September, in the year of our Lord one thousand eight hundred and ninety-three. Present, the honorable Joseph McKenna, circuit judge.

THE UNITED STATES OF AMERICA
*vs.*
HERMAN SPARF AND HANS HANSON. } No. 2173.

On motion of F. J. Kierce, esq., of counsel for the defendants, Herman Sparf and Hans Hanson, who were present in open court, and by consent of Charles A. Garter, esq., United States attorney, it is ordered that the time to impose sentence on said defendants be, and the same hereby is, continued one week, to September 18th, 1893.

45 *Judgment.*

In the circuit court of the United States, ninth circuit, northern district of California.

SEPT. 18TH, 1893.

THE UNITED STATES
*vs.*
HERMAN SPARF AND HANS HANSON, impleaded with Thomas St. Clair.

And now on this day come the above-named defendants, Herman Sparf and Hans Hanson, with their counsel, Messrs. Francis J. Kierce and James F. Smith, and also comes Charles A. Garter, esq., United States attorney for the northern district of California, appearing on behalf of the United States, and the said defendants, Herman Sparf and Hans Hanson, having heretofore been regularly and duly indicted by a grand jury of the United States for the crime of murder by the killing of one Maurice Fitzgerald on the thirteenth day of January, in the year of our Lord one thousand eight hundred and ninety-three, on the high seas and on board of the American barkentine Hesper, and the said defendants, Herman Sparf and Hans Hanson, having been duly arraigned upon said indictment and having made and entered a plea of not guilty thereto, and having been tried by a jury of the country, and by said jury found guilty of the said offense, as charged in said indictment, and now being brought before this court to receive the sentence and the judgment of this court upon said verdict, and

46 Charles A. Garter, esq., United States attorney, having moved that this court pass judgment and sentence, thereupon counsel for the said defendants moved this court for a new trial, which motion, after argument of counsel, was denied, to which ruling counsel for the said defendants duly excepted. Defendants were then asked by the court if they had any legal cause to show why judgment should not be pronounced against them, and no sufficient cause being shown the court proceeded to render judgment herein.

Whereas the said Herman Sparf and Hans Hanson, having been duly convicted in this court of the crime of murder, it is therefore ordered, adjudged, and decreed that the said Herman Sparf and Hans Hanson be taken hence by the marshal of this district and confined in close custody in the prison of this city and county, until Friday, the twenty-fourth day of November next, and then be taken by the marshal to some suitable place in this district and, between the hours of one and four in the afternoon of that day, be hung by the neck until they shall be dead. And it is further ordered that the United States marshal of this district do carry this sentence into execution.

A true copy.
Attest:

W. J. COSTIGAN, *Clerk.*

47 *Certificate to judgment record.*

In the circuit court of the United States, ninth judicial circuit, in and for the northern district of California.

THE UNITED STATES OF AMERICA
*vs.*
HERMAN SPARF AND HANS HANSON. } No. 2173.

I, W. J. Costigan, clerk of the circuit court of the United States for the ninth judicial circuit, northern district of California, do hereby certify that the foregoing papers hereto annexed constitute the record in the above-entitled action.

Attest my hand and the seal of said circuit court, this 23d day of September, 1893.

[SEAL.] W. J. COSTIGAN, *Clerk.*

(Endorsed:) Filed September 23d, 1893. W. J. Costigan, clerk.

48 *Stipulation and order extending time.*

In the United States circuit court, northern district of California.

THE UNITED STATES OF AMERICA, complainant,
*vs.*
HERMAN SPARF AND HANS HANSON, respondents. } No. 2173.

It is hereby stipulated and agreed that Herman Sparf and Hans Hanson, the respondents above named, may have, and they are hereby granted, seven (7) days further time from the date hereof in which to move for a new trial in the above-entitled action.

Dated September 4th, 1893.

CHARLES A. GARTER,
*Attorney for Complainant, and U. S. Att'y.*

Upon reading the foregoing stipulation, it is hereby ordered that the said respondents may have, and they are hereby granted, seven (7) days further time from the date hereof in which to move for a new trial in the above-entitled action.

Dated September 4th, 1893.

J. MCKENNA,
*U. S. Circuit Judge.*

(Endorsed:) Filed September 4th, 1893. W. J. Costigan, clerk. By H. J. McCormick, deputy clerk.

49 *Notice of intention to move for a new trial.*

In the circuit court of the United States in and for the ninth circuit, northern district of California.

THE UNITED STATES
*vs.*
HERMAN SPARF AND HANS HANSON, DEFENDANTS.

Please take notice that defendants intend to move the court to set aside and vacate the verdict and judgment heretofore rendered and entered herein, and to grant a new trial in this case, upon the following grounds, viz:

1. Irregularity in the proceedings of the court, jury, and plaintiff, by reason of which the defendants, and each of them, were prevented from having a fair trial.
2. Misconduct of the jury.
3. Errors in law occurring at the trial and duly excepted to by the defendants.
4. Insufficiency of the evidence to justify the verdict and that the same is against law.
5. Newly discovered evidence material to defendants, which they could not with reasonable diligence have obtained and produced at the trial.

The said motion will be made upon a statement of the case, a bill of exceptions and affidavits to be hereafter prepared, served, and filed.

JAS. F. SMITH, &
F. J. KIERCE,
*Attorneys for Defendants.*

To CHARLES A. GARTER, Esq.,
*United States Attorney.*

50 (Endorsed:) Filed Sept. 16th, 1893. W. J. Costigan, clerk.

51 *Stipulation and order extending time, &c.*

In the United States circuit court, northern district of California.

UNITED STATES OF AMERICA, COMPLAINANT,
*vs.*
THOMAS ST. CLAIR, HERMAN SPARF, AND HANS HANSON, defendants.

It is hereby stipulated and agreed that the defendants Herman Sparf and Hans Hanson may have and they are hereby granted ten (10) days' further time from and after the date hereof within which to prepare, serve, and file their bill of exceptions in the above-entitled cause.

Dated September 28th, 1893.

CHAS. A. GARTER,
*U. S. District Attorney and Attorney for Complainant.*

On reading the foregoing stipulation it is hereby ordered that the defendants Herman Sparf and Hans Hanson may have and they are hereby granted ten (10) days' further time from and after the date hereof within which to prepare, serve, and file their bill of exceptions in the above-entitled cause.

Dated September 28th, 1893.

J. McKENNA,
*U. S. Circuit Judge.*

(Endorsed:) Filed September 30th, 1893. W. J. Costigan, clerk.

52 *Stipulation and order extending time, &c.*

In the United States circuit court, northern district of California.

UNITED STATES, COMPLAINANT,
*vs.*
THOMAS ST. CLAIR, HERMAN SPARF, and Hans Hanson, defendants.

It is hereby stipulated and agreed that the defendants Herman Sparf and Hans Hanson may have and they are hereby granted ten (10) days' further time from and after the date hereof within which to prepare, serve, and file their bill of exceptions in the above-entitled cause.

Dated October 7th, 1893.

CHAS. A. GARTER,
*United States District Attorney and Attorney for Complainant.*

Pursuant to the foregoing stipulation, it is hereby ordered that the defendants Herman Sparf and Hans Hanson may have and they are hereby granted ten (10) days' further time from and after the date hereof within which to prepare, serve, and file their bill of exceptions in the above-entitled cause.

Dated October 7th, 1893.

J. McKENNA,
*Judge.*

(Endorsed:) Filed Oct. 7, 1893. W. J. Costigan, clerk, by W. B. Beaizley, deputy clerk.

53 *Stipulation and order extending time.*

In the United States circuit court, northern district of California.

UNITED STATES, COMPLAINANT,
*vs.*
THOMAS ST. CLAIR, HERMAN SPARF, and Hans Hanon, defendants.

It is hereby stipulated and agreed that the defendants Herman Sparf and Hans Hanson may have and they are hereby granted ten (10) days' further time from and after the date hereof within which time to prepare, serve, and file their bill of exceptions in the above-entitled cause.

Dated October 17th, 1893.

CHAS. A. GARTER,
*United States District Attorney and Attorney for Complainant.*

Pursuant to the foregoing stipulation, it is hereby ordered that the defendants Herman Sparf and Hans Hanson may have and they are granted ten (10) days' further time from and after the date hereof within which to prepare, serve, and file their bill of exceptions in the above-entitled cause.

Dated October 17th, 1893.

J. McKENNA,
*Judge.*

(Endorsed:) Filed Oct. 17, '93. W. J. Costigan, clerk.

54 *Stipulation and order extending time, &c.*

In the United States circuit court, northern district of California.

UNITED STATES, COMPLAINANT,
*vs.*
THOMAS ST. CLAIR, HERMAN SPARF, and Hans Hanson, defendants.

It is hereby stipulated and agreed that the defendants Herman Sparf and Hans Hanson may have and they are hereby granted 5 days' further time from and after the date hereof within which time to prepare, serve, and file their bill of exceptions in the above-entitled cause.

Dated October 27th, 1893.

CHAS. A. GARTER,
*United States District Attorney and Attorney for Complainant.*

Pursuant to the foregoing stipulation, it is hereby ordered that the defendants Herman Sparf and Hans Hanson, may have and they are hereby granted 5 days' further time from and after the date hereof within which to prepare, serve, and file their bill of exception in the above-entitled cause.

Dated October 27th, 1893.

J. McKENNA,
*Circuit Judge.*

(Endorsed:) Filed October 27th, 1893. W. J. Costigan, clerk, by W. B. Beaizley, deputy clerk.

55 *Order extending time, &c.*

In the circuit court of the United States for the ninth judicial circuit.

THE UNITED STATES,
*vs.* } 2173.
HERMAN SPARF AND HANS HANSON.

In the above-entitled action, it is hereby ordered that defendants may have five (5) days from the date hereof, within which to prepare, serve, and file their statement and bill of exceptions on appeal.

Dated November 1, 1893.

J. McKENNA,
*Judge.*

(Endorsed:) Received a copy of within order this 1st day of November, 1893. Chas. A. Garter, U. S. attorney. Filed Nov. 1, 1893, W. J. Costigan, clerk.

56 *Order extending time, &c.*

In the United States circuit court, northern district of California.

UNITED STATES, COMPLAINANT,
*vs.*
THOMAS ST. CLAIR, HERMAN SPARF, Hans Hanson, respondents.

Good cause being shown, it is hereby ordered that the defendant, Herman Sparf and Hans Hanson may have, and they are hereby granted two (2) days further time to prepare, serve and file their bill of exceptions in the above entitled cause.

Dated November 6th, 1893.

J. MCKENNA,
*Circuit Judge.*

(Endorsed:) Filed Nov. 6, 1893, W. J. Costigan, clerk. By W. B. Beaizley, deputy clerk.

57 *Bill of exceptions.*

In the United States circuit court, northern district of California.

UNITED STATES
*vs.*
HERMAN SPARF AND HANS HANSEN.

Be it remembered that heretofore, to wit, on the 8th day of May, 1893, the said court made and entered on its minutes, its certain order in the words and figures following, to wit:

It is ordered that the clerk of the court and Frank C. Edwards, esq., a commissioner, heretofore appointed for that purpose select the names of not less than 150 persons, possessing the qualifications prescribed by law, residents of the city and county of San Francisco, State of California, and place said names in a box, from which they can be publicly drawn, the persons whose names are so drawn to serve as trial-jurors of the circuit court of the United States of America, in and for the northern district of California.

That during said term of court at which the trial of defendants was had, to wit, from the 2nd Monday in July, 1893, to the 4th Monday in November, 1893, no other order was ever made or entered for the selection of any names to be placed in the box from which trial-jurors might be drawn.

That the clerk of the court and the commissioner mentioned in said order did select the names of 150 persons possessing the qualifications prescribed by law, residents of the city and county of San Francisco, State of California, and place' said names in a box, from which they could be publicly drawn, to serve as trial-jurors in the above entitled action.

That thereafter, on the 11th day of July, 1893, said above entitled matter was set for trial for the 15th day of Aug., 1893; on July 11th, 1893, the names of 100 persons were publicly drawn from said
58 box, and the marshall was directed to summons the persons whose names had been so drawn to act as trial-jurors in said court, which

said marshal did. It was admitted that the 150 names added to the names left in the jury box from the previous term made 300 names in said box after said 150 names had been added.

That thereafter and on the 15 day of August, 1893, the above entitled matter came on for trial before said circuit court, Charles A. Garter, esq., appearing as counsel for the United States and Messrs. F. J. Kierce and James F. Smith appearing as counsel for defendants, and said 100 persons or thereabouts appearing in response to said summons to appear as jurors.

Whereupon the defendants interposed in open court a challenge to the entire panel and to all the persons so summoned by said marshal to act as jurors in said court upon the ground that the names of 300 persons qualified to act as jurors in said court had not been placed in the box at the beginning of or during said term of said court.

(Specification B.) The court denied and overruled the challenge and objection of defendants to said panel and persons summoned to act as jurors in said court and said defendants then and there duly excepted to the ruling of the court, and assign said ruling as error, and present and tender their bill of exceptions thereto, which the court hereby signs, seals, settles, and allows.

Thereupon, the names of 12 of said persons so summoned to act as jurors as aforesaid were drawn and said 12 persons took their places in the jury box to be examined touching their qualifications to act as jurors. Whereupon said defendants challenged and objected to said 12 persons, and each of them upon the ground that the names of 300 persons qualified to act as jurors in said court had not been placed in the box provided for that purpose at the beginning of, or during said term of said court.

(Specification C.) The court denied the challenge and overruled said objection of defendants to said 12 persons and each of them, to which ruling of the court the defendants then and there duly excepted,
59 and now assign said ruling as error and now present and tender their bill of exceptions thereto, which the court hereby signs, seals, settles, and allows.

Thereupon, one of said twelve persons so placed in said jury box as aforesaid was examined touching his qualifications to act as a juror on the trial of the above entitled matter by the United States and by the defendants. Whereupon, the court, against the objection and protest of defendants, ruled that each juror examined touching his qualification to act as a juror in said cause if challenged peremptorily, must be challenged upon the completion of his examination, touching his qualifications and that the defendants were not entitled to examine the entire 12 men touching their qualifications before exercising their right of peremptory challenge.

(Specification D) To this ruling of the court the defendants then and there duly excepted, and hereby assign said ruling of the court as error and now tender and present their bill of exceptions thereto, which the court hereby signs, seals, settles, and allows.

After the examination of 12 persons touching their qualifications to act as jurors and before they were sworn in to try said cause, said defendants challenged and objected to said persons being sworn to try said cause upon the ground that the names of three hundred persons qualified to act as jurors had not been placed at the beginning of, or during the term at which the trial herein was had in the box, provided for that purpose from which trial jurors were to publicly drawn.

(Specification E) The court overruled the objection and challenged of defendants, and defendants assign said ruling as error, and now tender their bill of exceptions thereto, which the court hereby signs, seals, settles, and allows.

Thereafter, subject to the objection and exceptions of defendants, a jury having been empannelled to try said cause, the following proceedings were had.

60 *Testimony of F. A. Sodergren.*

F. O. Sodergren, called and sworn on behalf of prosecution, testified as follows:

I am a master of vessels, and was master of the Bark Hesper on or about the 22d of December, 1892.

Q. Will you state what flag she carried at that time?

Mr. SMITH. Defendants objected to the question as immaterial and incompetent, if it is offered for the purpose of showing the national character of the vessel.

The COURT. I suppose it will be followed by some other proof.

Mr. GARTER. I shall for the sake of caution follow the proof that was made on the other trial, but at the same time I think I am entitled to show by parol proof what her nationality was by the flag she carried.

The COURT. I overrule the objection.

(Spec. I. To which ruling of the Court the defendants then and there duly excepted and now assign as error, and now tender this bill of exception thereto, which the court hereby signs, seals, settles, and allows.)

A. She carried the American flag. She started from New Castle on the 22nd day of December, 1892. Those who constituted her crew at that time, and during that voyage were: John Lucas, first mate; Morris Fitzgerald, second mate; John Langlis, carpenter; Ah Hong, cook; Peter Luck, steward, and eight seamen, consisting of the starboard watch was, St. Clair, Herman Sparf, Hans Hansen, Edward Larsen, and the port watch,

61 Thomas Green, John Oleson, Pandy Ziggereare and Henry Westerling, and myself and wife, were all the persons on board. All continued on the vessel until the 13th of January, 1893, when we missed the mate.

On the vessel we had a dog and cat and three or four chickens.

The last time I saw the second mate, Morris Fitzgerald, was on the night of the 13th of January last, when I came on deck at about a quarter to ten. I came out of the after companion way and walked up this way, and the second mate was standing about here, and as I walked up this way [indicating] he walked around abaft the wheel box here, down this side here; St. Clair was at the wheel. The sails were just exactly as you see them on this picture. With the exception that it was very dark and cloudy, the weather was fine, and the vessel was going at about six or seven miles per hour by the wind, starboard tack; same tack as represented there on the diagram. The sea was moderate. I then went below. By saying that the sea was moderate, I do not mean that it was smooth. A vessel going along about six or seven miles an hour will require some breeze to make her do so, especially on the wind. It was not what you would call a heavy sea, nor was it a calm sea, it was enough to wet the ship's rails sometimes.

On the watch were the second mate, Thomas St. Clair, Herman Sharf, Hans Hansen, and Edward Larsen. After I went below I retired on the sofa in the after cabin, and shortly after I heard two shrieks but did not pay any attention to them.

62 At that time my wife was preparing for bed in her stateroom. I may have been half an hour on the sofa when I heard the noise, and it might have been less. I heard no other noise except that the dog barked once or twice and then all was quiet. At ten minutes past twelve o'clock, Mr. Lucas came and called me. I jumped up, put on my clothes and went on deck. I went on deck to look for the second mate. When I came on deck I saw the mate on the deck load—the first mate—saw him with a lamp looking around on the deck load for the second mate.

MR. SMITH. That is objected to as immaterial and not within the knowledge of the witness.

The COURT. He says that he saw him there.

Mr. GARTER. Do you know what he was looking for?

A. I knew then what he was looking for, as he told me already.

When I went up on the deck Edward Larsen was at the wheel, and the members of the crew were all amidships on the deck load, with the exception of the carpenter, the cook, and steward—they were all below. Those that were standing amidships were doing nothing particularly, excepting the mate, Lucas, who was looking around with his lamp, and I called him away from there and asked him if he had found the mate; he said "No." "Don't the watch know where he is? Call the starboard watch aft." They came aft on the after end of the deck load. I was standing on the forward part of the poop and asked those men if they did not know what became of the second mate; they all said no, know nothing about

63 it. Finally Hermann Sparf says, "I saw him go up the fore-rigging about eleven o'clock." I said "Yes; didn't you see him come down?" He said, "No." I said, "You men can't tell me? You have been here all these four hours and don't know where the mate is? He made no reply. I then went to the man at the wheel, Edward Larsen. It was about thirty feet more or less, from the wheel to the place where Sparf and Hansen were standing. Larsen was performing his duties at the wheel when I went to him. After I left Larsen I went up on the deck load with the mate, Lucas. I asked him if he had been down to the carpenter shop. He replied, "No; let us go and call the carpenter." We went down in the carpenter shop to call the carpenter. I asked the carpenter if he knew anything about the second mate, and he said, "No." "Do you mind putting your clothes on and getting up and helping us to find him?" He said, "Certainly," and did so. The three of us went on the deck load together; as we came up on the lee side of the gangway ladder on the deck load turning into midship, up to the weather side, we discovered blood on the gangway ladder, and on the lashing-plank, and on the deck load.

THE COURT. At the time that Herman Sparf said the second mate had gone up the foremast, did anybody else make any explanation but Herman Sparf?

A. Not at that time.

(Continuing). The three of us came out through this door, myself, Mr. Lucas, and the carpenter, and walked up there. There is a platform
64 built here about 18 inches high, and a ladder to go up on the deck load, and we came up from there and walked on this side a little bit on the lee side, turning up this way, up to the windward side to the gangway, up across the gangway, and looking around we discovered blood on the edge of this gangway very thick, and traced it right along, and called their attention to it. I said, "Men, what is this? Foul play has been done here." No reply was made. I heard someone amongst them on this side [indicating side] the crowd say that they saw blood, when I called their attention to it strictly. I don't know who it was. We were all there at the time, being the mate, Mr. Lucas, and the crew and myself and the carpenter.

We saw the blood here [indicating] and found a lighter spot here [indicating], and also one here [indicating] a little lighter close to that tub [indicating]. When I saw the blood I took the mate by the arm and asked him if he was armed. He said no. We traced the blood to the ship's rail right here [indicating]. There was blood which we discovered afterwards, but on the impulse of the moment we only discovered blood on that trail there, but there was blood here that had been washed away [showing].

After this we went down in the cabin, each one loaded a pistol and the mate replied he had a pistol but it was in his trunk. I told him to load it and put it in his pocket, and then we went on deck again—to the same place where we had left. When we first discovered the blood the mate's lamp that he had did partly go out. I called for the carpenter to
65 go and get the anchor light. First he replied, "There is no other light." I says, "Get the anchor light," and he did, and he brought that anchor light out which he used afterwards, the second time when we came on deck, then we renewed the search, but by that time the wheel had been relieved. The watch had been changed and the starboard watch had gone below to bed—that is, St. Clair, Herman Sparf, Hans Hansen, and Edward Larsen. That left only three men on the port watch on the deck-load when we came there to search the second time. I then went into the forecastle with the mate, telling him to call the men out for the purpose of taking their statements and making an official log. As we went around the forecastle there was a light went out of a sudden in the forecastle; we walked right on and the mate went in first and struck a match and lit the lamp, St. Clair came out and helped him to light it. I was standing by the side of the mate, a foot from him, at that time and the mate said, "Get up, men, get up." Hans Hansen rushed up to me and said, "Here we are, what is it?" I replied, "We want to see you men aft," and he retired, put his clothes on and said all right; and we got out of there and went aft into the cabin, and a few seconds afterward the starboard watch followed, that is St. Clair, Herman Sparf, Hans Hansen, and Edward Larsen. I said, "One at a time." They all came through the door heedless about it. I said, "All right, let them come in." The first mate was present, Langlais the carpenter, also, and the four men just stated. I asked those four men if they
66 could account for that blood on the deck, and they all said no. Herman Sparf replied the same as he did previously, on the deck

before, that he saw the mate go up the fore-rigging at 11 o'clock. St. Clair and Hans Hansen said they had been asleep between the hours of ten and twelve on the deck-load in the stern of the little boat right here [indicating on diagram]; said that they had heard nothing, and saw nothing, during those two hours, with the exception at least that they went down to light their pipes in the forecastle. Then St. Clair said, "The man may have committed suicide," Hans Hansen said something similar. St Clair said also, "May have come along and fell and hurt himself very badly, bled to death, and afterwards got up and walked overboard."

I saw blood on the cheek of Herman Sparf at the same time in the cabin. I took down their depositions where they had been during the four hours of their watch on deck, from eight o'clock that evening until midnight, twelve o'clock. St. Clair had been at the helm the first two hours from eight to ten. I don't remember who was on the lookout the first two hours of the watch; the last two hours Edward Larsen was at the wheel and Herman Sparf was on the lookout, they said, and St. Clair and Hans Hansen had been sleeping in the stern of the little boat. I took those remarks down and told the men I hoped they told me the truth, and sent them to their beds, as it was their watch below.

67 I then armed the carpenter; the mate was armed. I, myself, had a Winchester rifle, and the three of us remained on the ship's deck all the time that night after one o'clock, after we were through with the examination of the crew, until four o'clock, until the starboard watch had to come on deck and relieve the port watch. Nothing was said to the starboard watch when they came on deck to relieve the port watch in regard to anything. Hans Hansen took the wheel at four o'clock in the morning, and the others remained somewhere about midships or forward. It was now about breaking day, being south latitude, and day breaks about that time. At twenty minutes past four I called out to Mr. Lucas and called Herman Sparf aft in the cabin. I went down first. The carpenter followed me, and the mate, Mr. Lucas, brought Herman Sparf down in the cabin. I told Herman Sparf in brief words that the blood on the deck was too strong an evidence to let any of the starboard watch or him go loose. "I must put you in irons to protect myself from the authorities at the port of my destination."? He made no objection; I put the irons on him and locked him up in the stateroom, and I did likewise with St. Clair next, and told the mate to let Edward Larsen relieve Hans Hansen from the helm, which he did, and I did likewise with him, and gave them temporary quarters until I could find out the circumstances of the case. I examined the remainder of the crew, with the exception of the three put in irons; I never spoke to them or had any conversation with them until we got into Tahiti.

68 On that night, the second time I came up to make a second examination, I saw a small tub half full of water and blood; I don't remember exactly whether it was in the gangway here [pointing to diagram] or it was standing there. I also saw a broom lying in the gangway here [indicating], an ordinary American corn broom, saturated with blood, at the same time I discovered the tub with the blood and water.

Next morning I found blood on the fore braces in two places, about 12 or 14 inches wide. I saw a piece of scalp with a small piece of black hair attached to it, about 2 inches more or less in length and about one and a half inches in width; it was right on the edge of the gangway, in the thickest pool of blood; this was on the 14th of January, but I don't remember the time, but I think it was before breakfast. I did not take any care of it whatever, and about two days after that, I think it was Sunday, I came to think of that hair and I thought I had better take care of it, and spoke to the mate about it, and told him to go and get it; and when he went there to get it it was gone. I found that Thomas Green had taken it; he had it in a tin. I told him to bring it and give it to me. I think this was on Sunday, a couple of days afterward. I took the tin; it was one of those Royal Baking Yeast Powder tins, I think, that he got from the cook, and I took the cover off and looked at it. I asked the carpenter to take the tin and cover it up, which he did, and I kept it until I came here and gave it to the marshal.

Q. (Handing tin to the witness.) Was that the tin?

A. Yes, that is the tin.

Q. Look inside and see if, in your judgment, the article in there
69 is the article that you put in there at the time that you refer to.

A. Yes, it looks like the same black hair, with silver-grey hair in it, only it is not thick and stuck together like *like* it was at that time.

Q. At any rate, this is the tin that you say you gave to the United States marshal?

A. Yes, sir.

Q. After coming to the port here; after coming to San Francisco?

A. Yes, sir.

Mr. GARTER. I will have this marked, your honor. I will not introduce it in evidence now, because I will have to identify it a little further.

Next morning I found a hatchet in the forecastle at the time we were packing up the prisoners' clothes to take to them, and while we were searching for two revolvers, we found a hatchet under St. Clair's bunk it appeared to be, but they told me that St. Clair slept in the bunk above it, so that it was underneath where he slept, only not underneath him, but it was underneath the bunk above. I gave it to the cook first and asked him if it belonged to him, and he said it was, and I kept it until I arrived here and gave it to the marshal.

Q. Can you tell whether that is the hatchet or not that you delivered to the marshal? (Exhibiting hatchet.)

A. I will see if I can. Yes, sir; that is the very hatchet. I delivered it to Mr. Long, the United States marshal. I do not remember
70 whether it was done on the same day I arrived here. I think it was done on the next day.

(The tin can referred to was marked "A" for identification and the hatchet was marked "B" for identification.)

I also found a wooden club on the deck load close to the spot of blood. That is the club (examining club handed to witness for inspection by Mr. Carter, U. S. attorney). I found it on the 14th of January, next morning, and I left it lay there for some days, but I took it up afterwards and kept it, and I delivered it upon arriving here to the U. S. marshal, with the hatchet and tin of hair.

(The club was marked "C" for identification.)

I kept the defendants in irons until I got to Tahiti, an island in the South Pacific, under the French Government, and they were then taken ashore by the United States consul at Papiti, Tahiti; I stayed there eight days; during this time the defendants were kept in the French prison on the island kept by the Government, and were left there when I came away for Honolulu, my port of destination.

The occurrence took place in 30 south latitude, 159 west longitude; I would say I remember it was about 1,100 miles from the port of Papti, Tahiti, in a southwest direction, in the midst of the ocean.

Mr. GARTER. Q. How many ships did you see for ten days prior to the time when this occurred and before you got to Tahiti?

Mr. SMITH. That is objected to as immaterial.

The COURT. I suggest you bring it right down to the day.

71 Mr. GARTER. I will take a ruling on that question.

The COURT. I sustain the objection.

Mr. GARTER. Between the 13th day of January, 1893, and for ten days prior to that time, did you see any vessels or any boats while you were on your voyage?

Mr. SMITH. That is objected to as immaterial.

The COURT. I will overrule the objection. I wanted him to make it specific.

(Specification 2. To which ruling of the court the defendants then and there duly, excepted and now assign error, and tender now their bill of exceptions thereto, which the court hereby signs, seals, settles, and allows.)

A. I saw none.

Q. For ten days afterward, after the 13th day of January, or about eight days after the occurrence, and up to the time you got to Tahiti, how many vessels or boats did you see?

Mr. SMITH. The same objection, that it is immaterial.

The COURT. The same ruling.

(Specification 3. To which ruling of the court the defendants then and there duly excepted, and now assign as error, and tender their bill of exceptions thereto, which the court hereby signs, seals, settles, and allows.)

A. I saw none.

Q. On the 13th day of January, 1893, how many boats or vessels other than the Hesper did you see?

72 Captain, in asking you those questions, I will explain to you that—no; I will let the question stand without any explanation. As to the hair which you saw, and to which you have referred heretofore, what would you say about its being the hair of the second mate?

Mr. SMITH. I object to that. I do not think it to possible for a witness to testify to anything of that kind. The most he can say is to describe the hair, and the jury can then draw its own inferences.

The COURT. I don't know whether he can say anything about it or not. I don't know how much knowledge the witness possesses.

The COURT. Proceed, captain; answer the question.

(Spec. 4. To which ruling of the court the defendants then and there duly excepted, and now assign as error, and tender now their bill of exceptions thereto, which the court hereby signs, seals, settles, and allows.)

A. I understood it to be the second mate's hair. How he looked when I saw it on his head, you mean, or the hair I found?

Mr. GARTER. The hair you found. State whether or not that resembles the hair of the second mate. I call for the witness' opinion about that. That is all.

A. Well, the hair I found was dark, with a silver tint of grey in it, and that was the color of the second mate's hair.

Q. Did anybody else on the boat complain of losing their hair?

73 Mr. SMITH. That is objected to as immaterial, unless they were baldheaded.

A. I lost some of my own.

Mr. GARTER. About that time?

A. It goes off gradually.

Q. Was that your hair?

A. It is not my hair; no.

Hanson and St. Clair both claimed to have been asleep in the stern of a little boat between ten and twelve o'clock and claimed to have heard no noise; the boat was about twelve feet from where the blood spots were found, and the dog kennel was close to the stern of the little boat also. The blood spot referred to was about eight feet from the mainmast. All the windows and doors of the after part of the cabin were open on that night.

Mr. GARTER. Captain, I will ask you if, at any time after the defendants had been put in irons, and before you arrived at Tahiti, either one of the defendants made any statements to you relative to the homicide?

Mr. SMITH. That is objected to as immaterial and irrelevant, on the ground that at that time the defendants were under arrest and in confinement, and under the common-law rule no statement could be made by them while in that condition.

(After argument it was held that the court should reserve its decision until a subsequent time, to enable counsel to present their authorities in support and against the motion.)

*Testimony of John Lucas.*

74 JOHN LUCAS, called and sworn on behalf of the complainant, testified as follows:

I am a seafaring man, and was first mate on the bark Hesper on the 13th of January, 1893. I know the defendants, Sparf and Hanson, and became acquainted with them at New Castle. I knew Morris Fitzgerald, who was second mate of the Hesper; he joined the vessel at Tacoma, State of Washington. I last saw him on the night of the 13th of January, 1893, at eight o'clock in the evening. I had charge of the port watch right through. The watches shifted about eight o'clock in the evening. It was at this time, when I was retiring from my watch, that I last saw the mate, Morris Fitzgerald. At the time I left him St. Clair was at the wheel. The mate is generally watching the steerage aft at night, and sees that a lookout is kept; the lookout is right on the forecastle head.

Q. From that time on, from the time you went below, please state what occurred that night so far as you have knowledge.

A. Yes, sir; I was called about one bell, that is, ten minutes to twelve o'clock, by one of the men from the starboard watch. I asked him "What is up?" It was Herman Sparf that called me; when I enquired

what was up he made no answer. I closed the door and ran on deck. It was the custom and duty of the second mate to call me under the regulations of the ships; unless he was very busy somewhere, or up aloft, he might send someone else to call me. I came on deck as eight bells were struck, about four minutes after I was called; could not see the second mate
75 the man at the wheel, Edward Larsen, did not know where he was; coming forward on the forward side of the house the watches were aft, and they sung out to me if they would go and relieve the wheel. Both watches sung out to me, "We are all aft if we go and relieve the wheel;" who sung out I do not know. I enquired where was the second mate; they said they did not know. Herman Sparf said he saw him going up in the forerigging at half past eleven. I told them to look around and find him; one of them to jump up aloft and see if they could see anything of him forward. I went to the forepart of the deck load and called out two or three times the second mate's name. I got no answer, and the man who went aloft said he could see nothing. I went aft down in the cabin, called the captain, and told him I could not find the second mate. He got up and I went in my room and lit my small dark lantern, and went on deck, into the carpenter shop, and under the forecastle, both sides, and then, coming up on the deck load, the captain called me and told me to call the starboard watch aft, and then he asked them if they knew where the second mate was. Herman Sparf said he saw him going up in the forerigging at half-past eleven. I went into the carpenter shop, the captain following me, and called the carpenter out and told him to put on his clothes. Then went on deck; came out on the lee side, and just as I was going to cross the main mast across the gangway, I saw the blood on the gangway; then the light I was carrying went out and I sung out for the carpenter to fetch the light; he said there was none to be
76 got. I told him to fetch the riding light or anchor light. He brought it and then we looked over the gangway and then there was a big pool of blood on a lashing plank. There was a broom and a whole lot of ropes; the broom way lying on them full of blood. I then went aft and sung out to relieve the wheel lookout, and went aft and armed myself; came on deck again and picked up the light again; with the captain, we traced the blood right up the rail from that bid pool, and there was blood on two parts of the braces on the outside and on the main rail of the outside and on the forepart of the stanchion. There was a stanchion for the deck load here (indicating), and there was blood on the forepart of the stanchion. I then called the men out. Hans Hansen came into the cabin, and said, "Here I am; what is it?" The captain told him, I want you men aft. "Went into the fore cabin; the carpenter was with us, and the men followed us shortly afterwards, and the captain inquired what they knew. Larsen said he was on the wheel; that he did not see the second mate from half-past ten. Herman Sparf said that he was on the lookout and seen him going up into the forerigging at half-past eleven and did not see him come down. Thomas St. Clair said he was from ten to twelve laying down and sleeping under the small boat at that time; that he went into the forecastle twice and lit his pipe, but heard nothing. When the captain asked him how he could account for the blood, "Oh," he says,

"he, the second mate, he fall over the chain lashing, hurt himself,
77 got up and walked overboard. Hans Hanson says, "He might commit suicide."

The carpenter and captain stood aft until after 5 o'clock. The watch came on deck to relieve the wheel and lookout, and after everything was quiet the captain now sent me on deck for Herman Sparf, and when he got down they put him in irons.

*Testimony of Edward Larson.*

EDWARD LARSEN, called and sworn on behalf of the prosecution, testified as follows:

I am a seaman, and on or about the 13th day of January last was employed on the bark Hesper, and came aboard of her on the 13th of December, 1892. I knew Morris Fitzgerald, and knew him from the time I came on board of the Hesper. I belonged to the starboard watch on that night. I went on watch that night about eight o'clock; from eight to ten o'clock I was on deck load and from ten to twelve I was at the wheel; Thomas St. Clair had been at the wheel before me. The second mate was aft when I took the wheel; Hans Hansen was on the lookout; but Herman Sparf was supposed to relieve him at the time I went to the wheel sir. Hans Hansen had the lookout from eight to ten, sir; and Herman Sparf was supposed to come on from ten to twelve sir.

Q. At what time did you see St. Clair again during that watch?

(Spec. 5. Objected to as immaterial; court overrules objection, and defendants except and hereby assign as error and present their bill of exceptions, which the court signs, seals, settles, & allows.)

A. Yes, sir; at 20 minutes past ten; the 2nd mate was then aft.

Q. What, if anything, did St. Clair say to the 2nd mate?

Mr. SMITH. That is objected to as immaterial and incompetent.

The COURT. I will overrule the objection.

78 Mr. SMITH. Your honor understands that neither of the defendants were there at that time.

The COURT. I understand.

(Spec. 6. Defendants then and there excepted to the rulings of the court, and now assign said ruling as error, and now and hereby tender their bill of exceptions thereto, which the court hereby signs, seals, settles, and allows.)

St. Clair said to the mate that there was something carried away overboard, and the second mate followed him forward. I afterwards heard the second mate sing out twice, and the dog barked at the same time. I saw Herman Sparf and Hans Hansen again that night in the forecastle; they said nothing to me at that time.

Q. Were you ever present before the time the mate disappeared from the "Hesper" when the subject of killing the mate or the captain, or anybody on board of the Hesper, was discussed when Herman Sparf, Hans Hansen, and Thomas St. Clair was present?

(Defendants objected to the question on the ground that there is no conspiracy alleged in the indictment, and on the ground that it is immaterial, irrelevant, and incompetent.)

The COURT. I overrule the objection.

(Spec. No. 7. To which ruling of the court the defendants then and there duly excepted, and now assign such ruling as error, and now hereby tender their bill of exceptions thereto, which the court hereby signs, seals, settles, and allows.)

A. Yes, sir.

Q. State what was said.

79 (Defendants objected to the question on the ground that there is no conspiracy alleged in the indictment, and on the ground that it is immaterial, irrelevant, and incompetent.)

The COURT. I overrule the objection.

(Spec. No. 8. To which ruling of the court the defendants then and there duly excepted, and now assign such ruling an error and tender now thei' bill of exceptions thereto, which the court hereby signs, seals, settles, and allows.)

A. It was one day, sir, when the captain was gone into the cabin, sir. I heard Herman Sparf call the captain a son of a bitch, and he said he had to be killed, and we would be our own boss and take the ship from him, and take the ship and go ashore, sir. I heard Herman Sparf say that in the forecastle, sir. I asked Herman Sparf how he would kill the captain, and St. Clair said, "Larsen, (meaning me) does not understand the business.

80 *Testimony of Thomas Green.*

THOMAS GREEN, called and sworn for the prosecution, testified as follows:

I was a seaman on the bark Hesper, bound from New Castle, New South Wales, to San Francisco. On the night of the 13th of January, 1893, I was the lookout from 6 to 7. While I was on the lookout Hans Hansen came up to relieve me. I says to him "What do you think of the weather; I think we'll have a fine night, don't you?" and I said, "Is it not a shame that the captain should be getting on to the carpenter, calling him names." "Well," he says, "the captain will be dead before morning." I says, "What are you going to do with the ship?" He says, "We are going to take her down to the Chilean coast, and when we sight land we will take the big boat and leave her." I says to him, "Who is going to take charge of the ship?" He says, "You, I suppose." I was laughing, and I left him and turned in. That is the conversation we had.

After I turned in I went to sleep, and while I was asleep I was called by a man named Herman Sparf. I turned out as I was and went on deck in my underclothes. I saw Hansen sweeping the deck with a broom, and I says, "Hello, boys, what is the news? what is the matter?" St. Clair says, "We want you to give us a hand to throw the captain overboard." I says, "St. Clair, how are you goin to get him on deck?" He says, "We will let go the peak halyards, and one of us would go to the wheel, and it would frighten the old man out of his sleep, and when he comes on deck is the time to do away with him. What do you say?" I

81 says, "Hold on a bit; I will go down and put a pair of pants on."

I also asked St. Clair about throwing the captain overboard; I says, "Where is your second mate?" And he says, "We killed him;

thrown him overboard; can't you see the blood on the deck?" And I looked and saw the pool of blood there, and I got scared and frightened, and made the excuse, "You better wait a bit and I will go down below and put a pair of pants on." I went into the forecastle and woke Olsen up and told Olsen what was done. So during the time we were in the forecastle Hans Hanson came in, took down a pair of pants to give me to put on; he says, "St. Clair wants to see you." I says, "All right; don't you make a noise." I says, "Let the watch go to sleep," and he went away, and while I was having the conversation with Olsen. Herman Sparf comes in, and Sparf says, "Tom, come here; what is the matter; why don't you come?" He says, "You are wanted; we want to see you." I told him not to make a noise, and to let the watch go to sleep; go away; I would have nothing to do with him. He went away. I remained in the forecastle till a quarter to 12; Hans Hanson came into the forecastle and called the watch; he says, "Hey! you sleepers, do you hear the news? It is one bell and the second mate is overboard," and we remained in the forecastle till 8 bells. We all came on deck at 8 bells, one after the other. I saw Sparf and Hansen on the deck, and they were inquiring after the second mate, and we were all looking after the second mate, and the captain says, "What's the meaning of this? Some foul play has been done."

He gave the first mate a revolver, and the watch went below.

82 Q. Did you see a broom there that night?

A. I did, sir.

Q. Who had it?

A. Hansen. I saw him sweep; he had the broom sweeping the deck; he was sweeping the blood off of the deck. This was between 11 and 12 o'clock.

Q. State whether you saw any marks of blood on St. Clair or Hansen that night?

Mr. SMITH. I object to anybody but Hansen and Sparf.

A. I never saw any blood on these two prisoners then.

Mr. GARTER. Did you see any blood on St. Clair when Hansen and Sparf were near him?

Mr. SMITH. That is objected to as immaterial.

The COURT. I will overrule the objection.

A. I never saw any blood on him.

(Specification No. 9. To which ruling the defendants then and there duly excepted and assign said ruling as error, and now tender their bill of exceptions thereto, which the court hereby signs, seals, settles, and allows.)

When I came on deck I saw St. Clair and Sparf and Hansen, and the next thing I knew the captain and Lucas went forward into the forecastle and called the men out of their berths and called the watch aft, and the captain said he wanted to see them in the cabin, and they went down into the cabin and, coming out of the cabin, I met St. Clair on the starboard side.

Mr. SMITH. I object to that.

Mr. GARTER. I ask that the testimony in reference to meeting St. Clair, and what he did, and what the condition of his clothing

83 was, and of his person, be admitted in evidence for the purpose of establishing the corpus delicti of this case.

The COURT. As to the declarations of St. Clair and the acts of St. Clair afterwards, I think they should be excluded. I will admit testi-

mony as to his appearance because that might have relation to the case, and what he did afterwards may or may not have relation to the case.

(Specification No. 10. To which ruling defendants then and there duly excepted, and which ruling defendants now assign as error, and now tender their bill of exceptions thereto, which the court hereby signs, seals, and allows.)

Mr. GARTER. Q. At the time you met St. Clair coming out of the forecastle to which you have reference, I will ask you what his appearance was, as to whether there was any blood upon him or any part of his person?

Mr. SMITH. That is objected to as immaterial, irrelevant, and incompetent.

(Specification No. 11.)

The COURT. The objection is overruled.

A. I don't know what clothes he had on, sir; I never saw any blood on him, not at that time.

(To which ruling defendants then and there duly excepted, and now assign as error and now tender the bill of exceptions thereto, which the court hereby signs, seals, settles, and allows.)

Mr. GARTER. Q. Did you that night see any blood on him?

A. I did, sir, a little after 12 o'clock that night; there was blood
84 on his hands. He was in the port side of the vessel. Hansen and Sparf were then on the starboard side.

Cross-examination:

(Referring to the conversation between witness and Hansen prior to the time when witness turned in to the forecastle about 8 o'clock on the night in question): In that conversation Hansen said the captain would be dead before morning. I asked him what he was going to do with the ship; he said he was going to take it on the Chilean coast. He said I was to have charge of those that were left. I did not believe him. I believed it was a joke. We were laughing and joking.

I got into the forecastle that night a little after eight. I was awakened between ten and eleven o'clock. Herman Sparf called me. I went out on the deck in my underclothes. I saw a man with a broom in his hand at the rail of the ship. It was Hansen. I asked St. Clair, "What's the matter, boys? What's the news? And then they told me. He said, "I want you to give us a hand to throw the old man overboard," referring to the captain. I asked them how they were going to get the old man out of bed. I wanted to know the the reason they wanted me there. That is why I asked the question. St. Clair says, "One of us will let go the peak halyards, and another will go round to the wheel and then they would frighten the old man out of his sleep, and when he comes up then is the time to do away with him." I was sitting down at this time. I says, "Where is your second mate? St. Clair says, "Can you not see the blood?"

Then I got scared, and told him I would go down and get a pair
85 of pants on. I went into the forecastle and woke up Olsen, and then Hansen came in and gave me a pair of pants and I put them on, and he says, "St. Clair wants you on deck." I went on deck at eight bells with the watch. When I came on deck the first mate was looking for the second mate. He asked where the second mate was. I said nothing, because there were other people there to tell him better than I could. The first mate searched around for the second mate with a bull's eye lantern,

and sent a man into the rigging for him. I did not say anything. Hansen told me on the forecastle head in the conversation, there were two revolvers and axes in the bucket lying on the accommodation ladder; this was the time we were joking on the forecastle head; he was telling me about the revolvers and axes in the gangway ladder.

Mr. SMITH. Q. Did you make any statement to the district attorney?

A. I did.

Mr. SMITH. Q. Did you make any statement at Tahiti?

A. I did.

Mr. SMITH. Have you those statements, Mr. District Attorney?

Mr. GARTER. I believe I have.

Mr. SMITH. We ask for their production.

Mr. GARTER. I will let the statement at Tahiti go in if you want it.

Mr. SMITH. I want both statements.

The COURT. What do you want them for?

Mr. SMITH. For the purpose of impeaching this witness' testimony.

86 The COURT. The court declines to order the district attorney to produce it.

Mr. SMITH. We except.

Mr. KIERCE. I will ask the district attorney if those documents are not present in the court room?

Mr. GARTER. I decline to answer. I will say I have got half a dozen statements that purport to have been taken by every one of these persons. I should have been very happy to introduce them in evidence if I could have put them in; they were memoranda made by officers of the Government, furnished me for my private information in the conduct of this trial. The other statement referred to was taken by me in the office of the United States attorney as examination of the witness for the Government. That is confidential, and I decline to produce my private memorandum.

Mr. KIERCE. I will ask the district attorney if he has not the statement made by Green, before the consul at Tahiti, lying in front of him on his desk?

Mr. GARTER. I think I have it right in this envelope.

Mr. SMITH. We will take the evidence that he gave before the consul at Tahiti, and offer that. We want it for the purpose of offering it in evidence.

Redirect:

After the night of the 12th of January up to the time we reached Papete, at Tahiti, Hansen was in the lazarette, after the wheel; Sparf was in the place in the second mate's room, and St. Clair was in the forward lazarette. After we reached Tahiti we were all in the prison yard.

87 Q. Where did you go when you left there, from Tahiti?

Mr. SMITH. I object on the ground that the record is the best evidence where the ship was bound for and the port of destination and the place it arrived at first.

The COURT. I overrule the objection.

(Spec. 12. To which ruling defendants then and there duly excepted and now tender their bill of exceptions thereto, which the court hereby signs, seals, settles and allows.)

A. I went from Tahiti to San Francisco.

Mr. GARTER. Did that vessel stop at any other place during the voyage from Tahiti to San Francisco?

Mr. SMITH. Objected to unless the witness is shown to know.

The COURT. Objection overruled.

(Specification No. 13. To which ruling defendants then and there duly excepted and now tender their bill of exceptions thereto, which the court hereby signs, seals, settles and allows.)

A. No, sir; she did not stop at any other place.

88 THOMAS GREEN (recalled).

Mr. GARTER. Did you have a conversation with Hansen Sparf about this matter of the homicide of the second mate, Morris Fitzgerald, while on the Tropic Bird and while on your way from Tahiti to San Francisco.

Mr. SMITH. We object to the question upon the ground that it is immaterial, irrelevant, and incompetent.

The COURT. The objection is overruled.

Mr. SMITH. The defendants except.

(Specification No. 14. The defendants thereupon tendered their bill of exceptions to the ruling of the court, which being settled the defendants now assign said ruling as error.)

WITNESS. Yes, sir; We were all under arrest at the time, in irons and in confinement together—that is, Sparf, Hansen, Larsen, and myself. There were no promises made to either Sparf or Hansen to tell anything. No inducements were offered them to tell anything.

Mr. GARTER. Q. State what was said by the defendants?

Mr. SMITH. I object to the question on the ground that it is immaterial, irrelevant, and incompetent, and upon the ground that the statement is not shown to be and could not be voluntary while the defendants were in confinement, in chains, under a charge of murder.

The COURT. The objection is overruled.

Mr. SMITH. The defendants except to the ruling of the court and present their bill of exceptions thereto.

(Specification No. 15. The said bill of exception having been allowed and settled, the defendants now assign the ruling of the court as error.)

89 WITNESS. A. While on the voyage from Tahiti to San Francisco we were confined in the jail together, and one day while we were on it I asked Hansen, "What right has he to let go of the royal sheet?" He said, "To get the second mate forward." I said, "What for?" He said, "St. Clair wanted to give him a hiding, but he never thought the man was going to get murdered. When St. Clair left the wheel, he says, "I will tell you the whole of it."

He says on the night of the murder St. Clair left the wheel at 10 o'clock, relieved by Edward Larsen." He said he came forward and spoke to Hansen. St. Clair says to Hansen, "Where is Herman Sparf?" He says, "He is on the lookout." He says, "What is he doing up there?" "I don't know." St. Clair went on the forecastle head and spoke to Hansen. When he came down St. Clair says to Hansen, "You go and let go of the forecastle sheet and I will get the mate forward." He goes aft, St. Clair did, and brought the second mate forward and told him there was some-

and sent a man into the rigging for him. I did not say anything. Hansen told me on the forecastle head in the conversation, there were two revolvers and axes in the bucket lying on the accommodation ladder; this was the time we were joking on the forecastle head; he was telling me about the revolvers and axes in the gangway ladder.

Mr. SMITH. Q. Did you make any statement to the district attorney?

A. I did.

Mr. SMITH. Q. Did you make any statement at Tahiti?

A. I did.

Mr. SMITH. Have you those statements, Mr. District Attorney?

Mr. GARTER. I believe I have.

Mr. SMITH. We ask for their production.

Mr. GARTER. I will let the statement at Tahiti go in if you want it.

Mr. SMITH. I want both statements.

The COURT. What do you want them for?

Mr. SMITH. For the purpose of impeaching this witness' testimony.

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Mr. GARTER. I decline to answer. I will say I have got half a dozen statements that purport to have been taken by every one of these persons. I should have been very happy to introduce them in evidence if I could have put them in; they were memoranda made by officers of the Government, furnished me for my private information in the conduct of this trial. The other statement referred to was taken by me in the office of the United States attorney as examination of the witness for the Government. That is confidential, and I decline to produce my private memorandum.

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Mr. GARTER. I think I have it right in this envelope.

Mr. SMITH. We will take the evidence that he gave before the consul at Tahiti, and offer that. We want it for the purpose of offering it in evidence.

Redirect:

After the night of the 12th of January up to the time we reached Papete, at Tahiti, Hansen was in the lazarette, after the wheel; Sparf was in the place in the second mate's room, and St. Clair was in the forward lazarette. After we reached Tahiti we were all in the prison yard.

87 Q. Where did you go when you left there, from Tahiti?

Mr. SMITH. I object on the ground that the record is the best evidence where the ship was bound for and the port of destination and the place it arrived at first.

The COURT. I overrule the objection.

(Spec. 12. To which ruling defendants then and there duly excepted and now tender their bill of exceptions thereto, which the court hereby signs, seals, settles and allows.)

A. I went from Tahiti to San Francisco.

Mr. GARTER. Did that vessel stop at any other place during the voyage from Tahiti to San Francisco?

Mr. SMITH. Objected to unless the witness is shown to know.

The COURT. Objection overruled.

(Specification No. 13. To which ruling defendants then and there duly excepted and now tender their bill of exceptions thereto, which the court hereby signs, seals, settles and allows.)

A. No, sir; she did not stop at any other place.

88 THOMAS GREEN (recalled).

Mr. GARTER. Did you have a conver-sation with Hansen Sparf about this matter of the homicide of the second mate, Morris Fitzgerald, while on the Tropic Bird and while on your way from Tahiti to San Francisco.

Mr. SMITH. We object to the question upon the ground that it is immaterial, irrelevant, and incompetent.

The COURT. The objection is overruled.

Mr. SMITH. The defendants except.

(Specification No. 14. The defendants thereupon tendered their bill of exceptions to the ruling of the court, which being settled the defendants now assign said ruling as error.)

WITNESS. Yes, sir; We were all under arrest at the time, in irons and in confinement together—that is, Sparf, Hansen, Larsen, and myself. There were no promises made to either Sparf or Hansen to tell anything. No inducements were offered them to tell anything.

Mr. GARTER. Q. State what was said by the defendants?

Mr. SMITH. I object to the question on the ground that it is immaterial, irrelevant, and incompetent, and upon the ground that the statement is not shown to be and could not be voluntary while the defendants were in confinement, in chains, under a charge of murder.

The COURT. The objection is overruled.

Mr. SMITH. The defendants except to the ruling of the court and present their bill of exceptions thereto.

(Specification No. 15. The said bill of exception having been allowed and settled, the defendants now assign the ruling of the court as error.)

89 WITNESS. A. While on the voyage from Tahiti to San Francisco we were confined in the jail together, and one day while we were on it I asked Hansen, "What right has he to let go of the royal sheet?" He said, "To get the second mate forward." I said, "What for?" He said, "St. Clair wanted to give him a hiding, but he never thought the man was going to get murdered. When St. Clair left the wheel, he says, "I will tell you the whole of it."

He says on the night of the murder St. Clair left the wheel at 10 o'clock, relieved by Edward Larsen." He said he came forward and spoke to Hansen. St. Clair says to Hansen, "Where is Herman Sparf?" He says, "He is on the lookout." He says, "What is he doing up there?" "I don't know." St. Clair went on the forecastle head and spoke to Hansen. When he came down St. Clair says to Hansen, "You go and let go of the forecastle sheet and I will get the mate forward." He goes aft, St. Clair did, and brought the second mate forward and told him there was some-

thing the matter with the royal sheet, or carried away. He goes forward and as he was looking up underneath the foot of the mainsail St. Clair says, "Now is your time, boys," and St. Clair came down on him with an axe and as he was beating him he fell. Shall I show the description how he stood?

The COURT. Q. Was it shown to you?

A. No, sir.

Q. Only tell what was told you.

A. As the mate was getting beaten with the axe on his head and falling, he caught hold of Hansen's coat, and Hansen shook him off
90 and he went on the port side of the ship, so while he was butchering him the second mate crawled on his hands and knees to get aft, and he gave it to him again. I says to Hansen, "How many blows do you think you gave him; half a dozen?" "No," he says, "I reckon about twelve." Then he came across the deck to do something with the body. He did not state what they were doing to it—Herman Sparf and Hansen. St. Clair says to them. "Oh, let him alone; let the son of a b. lay there; we will go aft and murder the old man." Herman Sparf says, "Come here, Tom, I want to speak to you; don't be in a hurry. Don't you think we have done enough for to-night?" and talked him over. "Now," St. Clair says, "you have got me started and you won't help me, you sons of b's, you sons of b." During the time the cook came up and asked Hansen what was the matter. He says, "Nothing was the matter," and the cook went and turned in. "Now," he says to Herman Sparf, "you go down and call Olsen." He went down, but Olsen did not turn out, so St. Clair says to Hansen, "What did he say?" He said, "I guess he will not come." He says, "I wonder if Tom will go down," meaning me. Hansen came down and called me. I went on deck. I heard what was done just before I came on deck. Herman Sparf had hold of the man by the arm, Hans Hansen had him by the leg, and they couldn't throw him overboard in a certain portion of the ship and they took him a little further forward and put him into the sea. After that was done, during the conversation they were having themselves, which I forget the part of the conversation which was told to me, one bell went, a quarter
91 to 12, so St. Clair says to Herman Sparf, "You go down and call the mate, John Lucas. If he is asleep, cut his throat, and "Hansen," he says, "you go down and call the watch." That was the first time that the other two men, besides myself, heard that the second mate was gone overboard, so I says to Sparf, "What do you think you will get for that?" He says, "A'out 5 or 10 years." "Well," Hans Hansen says, "if I get twenty years I will be satisfied, as long as they do not hang me." Hans says, "We are just as bad as St. Clair." Herman says, "Oh, no, you made a mistake; we are not as bad as St. Clair." Hans says, "Why?" Herman says, "How do you make that out?" He says, "We threw the body overboard." "Yes, we did do that." Herman Sparf says, "We threw him overboard and we were in the plot; that is all they can punish us for, but all they want to know is to find out the man who done the murder—find out who done the murder—and I expect," he says, "the court will give us 5 or 10 years each." He says, "If that is all I think myself lucky."

Mr. GARTER. Q. Prior to the night of January 13th, I mean before January 13th, 1893, the night of these occurrences, did Hans Hansen or Sparf say anything to you about sticking together?

A. Yes; he said it twice. I think it was two days before the murder that Hansen was passing the forecastle head one afternoon. He says, "If there is anything wrongs, boys, we must stick together; and on the night of the homicide, after being investigated by the captain, I went in the forecastle to light my pipe; as I went in Hansen called me and said to me, "How did you get on in the cabin with the old man?" I said,
92 "He did not get no satisfaction out of me;" he said, "That is right; say nothing." Afterwards St. Clair spoke the same words to me in the forecastle when Sparf and Hansen were there in their beds. I made a mistake about that; it was Hansen I am talking about.

F. O. SODERGREN, recalled as a witness for the United States, testified as follows:

Mr. GARTER. Q. Can you state what the discipline or rule upon the Hesper was during the voyage about the men having weapons?

Mr. SMITH. The defendants object to the question upon the ground that it is immaterial.

The COURT. In what way do you claim that to be immaterial?

Mr. GARTER. I propose to prove that it was against the rules of the ship for any man to have weapons on the ship, and that St. Clair had a pistol and a hatchet on board in violation of the rules. The rules were in writing.

Mr. SMITH. The defendants object to the question on the ground that it is immaterial and incompetent.

(Specification No. 16.)

The COURT. The objection is overruled. To which ruling defendants then and there duly excepted and now tender and present their bill of exceptions thereto, which is hereby settled and allowed and signed and sealed by the court.

A. The rule is that no weapons are permitted on board of ship in the hands of any of the crew in the forecastle.

93 Mr. GARTER. Q. State whether or not you had any conversation with the defendant Hansen touching this transaction and homicide after the night of the 13th day of January and before you reached Tahiti.

A. I did, sir. There was no one present but Hansen. His statement was made freely and voluntarily. The conversation came about this way; I used to go down and see Hansen frequently and give him papers and reading matter, while he was in confinement in irons, and at different times he wished to speak to me about the subject, and I asked him not to; I asked him to keep it until the right time came and then tell the truth. It was about five days before we reached Tahiti that I took down the papers to him and asked him how he felt. He said, "Under the circumstances he felt all right, if he only know the consequence." I made no reply to him whatever. After giving him the reading matter and being ready to go up again, he said, "There is one thing I would like to tell you, captain; if it had not been for me you would not be alive to-day." I listened to him and I then said "What could possess you men to want to murder

me?" I did not tell him anything as to whether he ought to make a statement or not then, as I can remember. I had already told him I did not want to hear anything of it, but to keep it till the right time came and then tell the truth. At this particular time I offered him no inducement to tell him to say what he was going to say.

Cross-examination:

Mr. SMITH. Was there anything said, captain, to the defendant
94 Hansen at that time about St. Clair belonging to the criminal element; that he had done time and that he ought not to keep silent; that St. Clair had done time in China and belonged to the criminal element and Hansen was respectable, and he ought keep silent as to a man of that kind?

A. I did, after he had told me all about what was going on, which I have not finish' saying; after he was entirely finished I did, yes; he tole me all about how the second mate had been murdered.

The COURT. Do not say what he told you. They are now trying to ascertain *in* whether the statement, if he made any, is voluntary.

A. It was entirely.

The COURT. You must not state what the statement was until you have permission.

Mr. SMITH. Q. Was anything said to Hansen at that time, that by making a clean breast of this entire transaction, these criminals would be punished, and no harm would come to him?

A. Yes, sir; I told him afterwards, but you must understand I listened to everything and said nothing.

Q. At this conversation any time, before or after he made his statement?

A. I never spoke to him before or after this, or had any conversation with him about it before or after this. After this particular time, when he made this confession to me voluntarily and freely.

Q. At this particular conversation it was stated to him?

95 A. After he told me everything, I answered him, "There is certainly some credit due you, if it is true what you have told me now." I told him I thought if he told the whole truth to the court he would get off very lightly, but he certainly would not escape punishment. Those are my very words.

Mr. GARTER. Q. That was after the statement was made?

A. Yes, sir. I always had a feeling for Hans after that.

Mr. SMITH. Q. A favorable feeling, captain?

A. Yes, sir.

Mr. CARTER. Now, captain, state what was said to you by Hansen in that conversation.

Mr. SMITH. Defendants object to that question, upon the ground that the same is irrelevant, immaterial, and incompetent, and upon the ground that any statement made by Hansen was not and could not be voluntary.

The COURT. The objection is overruled.

Mr. SMITH. The defendants except to the ruling.

(Specification number 17. The defendants thereupon tendered and presented their bill of exception to the ruling of the court, and the court hereby signs, seals, settles, and allows the same.)

A. After he had stated if it had not been for him I should not have been alive at that time when he spoke to me that day, I listened to him, and I then asked him what possessed him, "or what did you want to kill me for? Had you not been well fed; have you not been well treated?" He said, "Yes, he did not know; he thought it was merely a crazy hallucination that came into their heads by St. Clair telling them that
96 all Californian vessels as a rule carried their outward freight back home in money, which would be perhaps $12,000 or $14,000, and that money they wanted to take, and St. Clair planned the whole thing how it was to get that money, and that particular night the time was set at 10 o'clock to commence on the 13th of January. Hanson said that St. Clair had a hatchet of his own, a new hatchet of his own, a new hatchet which he bought in Newcastle, which he gave to Sparf.

Q. Who had the hatchet?

A. St. Clair; he bought it at New Castle and gave it to Sparf to use that night, and the club that is here in evidence, he told Hans Hansen that he should use, and St. Clair himself would go aft on the poop and tell the second mate that something was wrong about the fore-royal sheet. He told Hans Hansen to let go of the fore-royal sheet first before he started to call the second mate's attention to it; then when the second mate came forward Hans Hansen was to hit him with this club, but he did not use it he told me, and when the second mate got within four feet about of Hans Hansen looking up under the foot of the mainsail, to see what was the matter with the fore-royal sheet, if he could see the sail was flapping, as he leaned back he saw St. Clair bury the cook's hatchet, that St. Clair bought the evening before, in the back of the second mate's head. The second mate hollered and grabbed hold of Hans Hansen as he was standing in front of the second mate at the time. Hansen pushed clear of the second mate and jumped to the port side of the ship. At that very moment the carpenters and cook came out from their quarters in
97 the aft end of the forward house. The cook said "What is the matter? What is the matter?" Hans turned round to the cook and says "Nothing is the matter, cook." He did that, he told me, so that the cook would not come on deck and the carpenter, because St. Clair would have killed them, as St. Clair turned round from the second mate at that very time, with his hatchet facing the cook and the carpenter; if they came out he thought he would have killed them right there and then. That is why he told them nothing was the matter and they went back to their beds. The second mate by that time had got on his knees and was crawling aft. St. Clair pushed the second mate in the back with his hand, and he fell down, and he went at him with his hatchet and hacked him up. When that was done Hansen turned sick to the stomach from seeing the blood and he said "This is enough for one night, let us throw the body overboard and wash the blood away." St. Clair would not here of it. He laughed at them and called them school boys. Hans then prevailed on Herman Sparf to help him throw the body overboard. He got Sparf on his side and he threw the body overboard, and started in to wash the blood away.

98 Q. Did he say anything during that conversation—I refer now to Hansen as to whether he did slack the foresail?

A. The fore-royal sheet?

Q. Did he say whether or not he did that?

A. He said St. Clair told him to let it go, and he did let it go. When you let go the sheet like that on any of the sails it is quite natural there will be a noise, because I heard this noise in my cabin. This is why I thought it was a sail they were hauling down in the time being. That will make a noise. It is quite natural when you hear *a* anything like that an offiser will rush to see what it is, and mend it or see it again.

Q. Hansen said he did actually loosen that?

A. He said he cast off the fore-royal sheet, to get the second mate forward.

Q. When did he say he did that?

A. Just at that time when St. Clair was organizing them, just before he went to bring the second mate forward.

Q. Did he say whether or not St. Clair told him where to stand?

A. Yes, sir; he told him to stand on the afterpart of the coal tub on the deck load and he was to strike the second mate first, and not knock him down as he came forward, and St. Clair was to kill him himself.

Q. State as to the fore-royal sheet; what was the actual condition of that the next morning?

99 A. It was off about two feet from its regular position where it ought to be; but Hans told me they went and took in the slack, to keep the sail from making any more noise, by hand. I heard that myself. I heard the noise stopping; I thought then some sail had been hauled down; that is a piece of chain attached to the fore royal sheet and leads through the ship hold in the end of the topgallant yard.

Recross examination:

At the time of this alleged confession Hansen said that if it had not been for him I would not have been alive now. He said his stomach turned sick when he saw the blood of the second mate, in the way St. Clair was hacking, and he said, "for God sake this is work enough for one night." Hansen told me that St. Clair had a pistol and an axe. I asked him what time were the two pistols and the hatchet thrown overboard; was it before I had you men down in the cabin, on the night of January 13th, at midnight, or was it after; and Hansen told me that he threw it overboard after he came out of the cabin. He did not say who; he

100 said, "we did." Hans said there were various plans to get me on deck and one of them was to run down and call me and tell me that the second mate was hurt; it is quite natural I should run up to see where he was, and they would kill me. He mentioned a plan proposed by St. Clair, not by Hansen. St. Clair proposed those matters to Herman Sparf and Hans Hansen; he said it was near 12 o'clock. To wind up, by making use of Hansen's words, he said, "That was St. Clair's last determination. It was after 1 bell had struck and the men were just in the forecastle; he said, "you go down and call the old man, and if the old bugger—that is the word he made use of—is asleep cut his throat, and I will go down and finish the skipper myself;" that was Hansen's language. This was after the second mate had been killed.

101 M. P. LUCK, called as a witness for the United States, having been duly sworn as a witness, testified as follows, to wit:

From December 22nd, 1892, up to the time we came into the port of San Francisco, I was steward on board of the Hesper, and was on board

on the night of January 13, 1893. I know the defendants, Sparf and Hansen. On the night of the 13th of January, 1893, I was asleep in my cabin. I heard the carpenter call the cook and me; he thought he heard some kind of a noise on deck. I heard the cook get up, go to the door of the donkey room, and say something; he came back at once; said nothing was the matter; I heard the dog bark, and some kind of an explanation from somebody. The cook slept in the same room with me. I had the top bunk and he had the lower one. The cook's name is Ah Hong; the carpenter's name is Langlais.

Q. State whether or not you had any conversation with the defendant, Hansen, after the night of the 13th of January and before you got to Tahiti?

A. Yes, sir; the day we went into port at Papete, going into Tahiti. The mate use to go round with me and one of the other men to bring their food. They were in three different parts of the ship aft. When I came that night the mate said he had no time to go along with me, because they were bracing yards going into port, and I had to go alone. When I came to Hansen's place he wanted some more tea. I brought it down to him and he said to me—

The COURT. One moment.

102 MR. GARTER. Q. Did you ask him to tell you anything?

A. No, sir.

Q. Did you offer him any promise or inducement?

A. No, sir.

Q. Or make any threats against him that it would be better for him if he told you anything?

A. Nothing at all. I did not like to talk to him.

Q. He told you freely and voluntarily?

A. Yes, sir; freely and voluntarily.

Q. Mr. GARTER. Do you wish to ask him any questions, Mr. Smith.

Mr. SMITH. Q. You did not have any conversation incident to it at all?

A. No, sir.

Q. Of no kind?

A. None whatever.

Mr. SMITH. We make the same objection that the evidence is immaterial and irrelevant and incompetent, and the foundation has not been laid.

The COURT. The objection overruled.

(Specification 15½. To which ruling the defendants then and there duly excepted and now tender their Bill of Exceptions thereto, which the court hereby signs, seals, settles, and allows.)

Q. Mr. GARTER. What was said in that conversation?

A. When I brought him this second cup of tea down, or it was a panikin, he said it might be his last cup of tea in this world. I asked

103 him why; "you did not kill any one?" He said, "No, I did not kill any one, but I gave a good hand to it." I said, "You had better tell the truth." "Al'right, I will do so." And I turned away.

Mr. SMITH. We object to the statement.

The COURT. Objection overruled.

(To which ruling the defendants then and there duly excepted and now tender their bill of exceptions thereto, which the court hereby signs, seals, settles, and allows.)

Mrs. F. O. SODERGREN, called as a witness for the United States, having been duly sworn as a witness, testified as follows, to wit:

I am the wife of Captain Sodergren, of the "bark Hesper." I was on board the "bark Hesper" on the 13th day of January last. On the night of January 13th I was in the cabin between the hours of 10 and 12 and between 10 and half past. I heard voices in the afterpart of the cabin, and a few seconds afterwards saw the steps or legs of two men jaming the side window. A few seconds after that—I don't know just how many—I heard two shrieks, a very loud one and a familiar one, and the dog barked, and the voice sounded like the second mate's voice. The dog barking drew my attention to it more than it would otherwise have done. It ceased instantly and I retired for the night. A few seconds after the men passed I heard the shrieks.

EDWARD LARSEN, recalled as a witness for the United States, testified as follows:

After St. Clair called the second mate forward I saw St. Clair again at twenty minutes to twelve at the wheel.

104 Q. What did he say, if anything, at that time to you?

(Specification No. 18. To this question the defendants then and there objected upon the ground that said question was immaterial, irrelevant, and incompetent; whereupon the court overruled said defendants' said objections, and the defendants thereupon duly excepted to said ruling, now assign said ruling as error, and the witness made answer as follows:)

A. He said that Hansen wanted to take the wheel.

Mr. GARTER. State what occurred?

A. I asked him what he wanted to take the wheel for. St. Clair said, "That is all right," and he walked forward again. St. Clair had his hand under his coat and walked on his toes when he came aft.

Mr. GARTER. Q. On the way from Tahiti to San Francisco, and when Sparf, Hansen, and Green and you were together, did you hear Sparf or Hansen say anything about the disappearance of the mate?

A. Yes, sir. No promises or threats of any kind were made.

Q. State what it was that was said?

(Specification No. 19. To this question the defendants then and there made objection upon the ground that said question was immaterial, irrelevant, and incompetent, and not voluntary; whereupon said court overruled said defendants' said objection, and the defendants thereupon duly excepted to said ruling and now assign said ruling as error.)

A. Hansen said he went down and slacked the Royal sheet. St. Clair went aft and called the second mate forward. As he came forward

105 the second mate looked up at the royal; the royal was flapping. At the same time St. Clair had an axe in his hand and he said, "Now is the time boys," and he struck him.

The second mate fell and grabbed hold of Hansen's coat and Hansen shoved him away and jumped over the gangway ladder. St. Clair was choking him and hitting the man in the head and hitting him all to pieces. Hansen and Sparf were standing on the other side of gangway looking at it. Hansen was scared and so was Sparf, and Hansen said to Sparf "Let us take the man and throw him overboard," and Herman took hold

of the man's shoulders and Hansen by the feet and they took the man and threw him over the side. Afterward Hansen took water, threw it on the deck, and washed the blood away.

Cross-examination.

It was Hansen who made this statement. Green spoke first to Hansen and asked him what he slacked the royal sheet for, and Hansen told the whole affair and said "he thought the second mate was only going to get a good licking." He said he slacked away the royal sheet because he thought the second mate was only going to get a licking.

*Testimony of Pandy Zacharia.*

PANDY ZACKARIA, called as a witness for the United States, having been first duly sworn, testified as follows:

I was on the Hesper the 13th of January last. I belonged to the port watch. I went to the forecastle at 8 o'clock that night and turned in at 9 o'clock. Westerling was in the forecastle when I turned in. Olsen and Green came in afterwards. Sparf and Hansen were on deck
106 then. Afterwards Hansen came and said, "It is one bell. It is midnight." After this Herman came in a couple of minutes and said, "Boys, we lost the second mate to-night. He is overboard." At 8 bells I went on deck. The first mate said, "Where is the second mate?" No one answered him. Sparf said to Lucas, "I don't know. I seen him aloft about half an hour ago." Mr. Lucas said, "Some one go and look for the second mate." I sang out for the second mate several times. No one answered. I said to the 1st mate, "I can not find him, sir." Mr. Lucas said, "Go aloft." I went aloft and sang out for him, but could not find him. Mr. Lucas had the small light when I came back, and I saw the blood on the deck. When the captain saw the blood the little light blew out. The captain sent me to the carpenter for the anchor light. I brought it and the captain said, "Boys, I see blood," but no one answered him. After this he took them three fellows aft. I saw a piece of hair on the deck. I saw the broom with blood on it.

Cross-examination:

The broom was right in the blood. At 8 bells, we of the port watch all came out of the forecastle together and marched down the port side of the vessel all together and reported to the 1st mate. The starboard watch, all except the man at the wheel, were then on the starboard side of the ship.

Redirect:

I saw St. Clair on the starboard side with his watch when the port watch reported at 8 bells.

Q. Did you see St. Clair on the port side that night?

107 A. No, on the starboard side.

Mr. SMITH. That is objected to.

Mr. GARTER. I want to ask this witness if he did not see St. Clair throw some clothes overboard on that night on the port side of that ship as a matter of cross-examination.

The WITNESS. I seen him do that.

(Specification No. 20:)

Mr. SMITH. We object to it as immaterial and irrelevant.

The COURT. (After argument.) You can ask him if he saw St. Clair. He said he saw three fellows; he has not said that any of them was St. Clair. What three fellows he has not said. Defendant excepted to the ruling of the court and now assign the same as error and tender their bill of exceptions, which the court hereby signs, seals, settles, and allows.

Mr. GARTER. Q. Pandy, could you see who the men were on the starboard side that you spoke of when you came out of the forecastle that night at 8 o'clock?

A. I seen three fellows.

Q. Could you tell who they were?

A. St. Clair, Herman Sparf, and Hans Hansen; the man at the wheel and the port watch go on the port side; the starboard watch on the starboard side.

Q. Where was Edward Larsen at that time?

A. At the wheel.

Q. You saw three men at the starboard side at that particular time?

A. Yes, sir.

108 Q. Did you see St. Clair at all on the port side that night?

Mr. SMITH. Objected to as immaterial and irrelevant.

The COURT. I think it is competent that he saw St. Clair with some one else that night.

Mr. GARTER. Did you see St. Clair at all that night afterwards on the port side?

The COURT. Q. Just answer the question "yes" or "no."

A. Yes, I seen St. Clair come from the forecastle.

The COURT. You say you saw him?

A. Yes, sir.

Mr. GARTER. Where did you see him? Can you point out on the map?

A. I saw St. Clair come right from here. (Pointing on the diagram.)

Q. Did you see where he went to?

A. Yes, sir.

Q. Where did he go?

A. After this he went right here. (Pointing.)

Q. Did you see him at any other time on the port side?

A. No, sir.

Recross examination:

Mr. SMITH. Did you testify in the case of the United States vs. St. Clair at the time you saw him at the forecastle head was about half past 12?

A. I no remember the time.

Q. Did you testify in that way?

A. Half past 1 or half past 2, I no remember now.

Q. You do not know?

109 A. No, sir.

Q. You remember how you testified in the case of the United States vs. St. Clair as to time?

A. I don't understand; I no remember the time now; I can't tell.

HENRY WESTERLING, called as a witness for the United States, having been duly sworn, testified as follows:

Know Sparf and Hansen on the bark Hesper. I was on the Hesper on January 13th last; I belonged to the port watch. I left the deck that night at 8 o'clock and went to the forecastle. I was the first of my watch to arrive on the forecastle. Then came Pandy, then came Olsen, and then Green, the last to arrive. At one bell Hansen came to the forecastle and sang out, "One bell, boys; turn up; we have lost the second mate to-night." The whole port watch was then in the forecastle in bed when we got on deck; the 1st mate was calling for the 2nd mate, but we could not find him.

Cross-examination:

At 9 o'clock Green came to the forecastle and said, "Are you sleeping, boys?" When Hansen came at one bell Green was in his bunk. I saw him dress himself when Hansen came. He was not sitting up dressed when Hansen came.

*Testimony of Ah Hong:*

AH HONG, called as a witness for the United States, having been duly sworn, testified as follows:

I was on the bark Hesper on the month of January last as a cook when the 2nd mate disappeared. One night the dog barked, and the carpenter said, "Cook, cook, go and see what's the matter." We came up and stand in the donkey-room at the door, and Hansen stand there, and I say, "What's matter?" and he say, "No matter, cook," "No matter, cook." Sparf and Hansen were on the starboard side of the ship near the mainmast.

(Witness shown Exhibit B, a hatchet.)

The WITNESS. I have seen this hatchet before. It belonged to me.

Mr. GARTER. *Q.* Did you gibe that hatchet to St. Clair that night?

(Specification No. 21. To this question the defendants objected upon the ground that said question was immaterial, irrelevant, and incompetent. Whereupon the court overruled the said objection, and thereupon the defendants duly excepted to the said ruling and now assigns said ruling as error.)

A. St. Clair asked me to lend him the axe. I said, What you want it for? He said, I want it to chop wood. St. Clair took the axe away.

Cross-examination:

When I said to Hansen "what's matter," it was a quarter to 11 o'clock. I know because I saw my clock.

Redirect:

When Hansen said "no matter cook" he looked very scared.

*Testimony of John Langlaus.*

JOHN LANGLAUS, called as a witness for the United States, having been duly sworn, testified as follows:

I was a carpenter on the bard Hesper on January 13th. I know both Sparf and Hansen. On that night the cook slept in the foreward bunk to me. My bunk and the cook's join together.

On that night I heard the dog bark twice, and then "Ah-ah-ah."
111 I called the cook and the steward and said, "Any one been inside here?" He says, "I don't know." I said, "You go out and see." The Chinaman went out and I followed him. The Chinaman said "what's matter?" Some one replied, "Nothing is the matter." I seen the shadows of three men on deck.

Cross-examination:

I was within two feet of the Chinaman; it was so dark that I could not recognize any of the shadows that I saw. It was not possible for me or the Chinaman to see anyone at the mainmast. I couldn't see the mainmast from where I was; it was too high and I was too low. No light was lit there. My bunk was in the adjoining apartment from the Chinaman's. I couldn't see any clock; I had two at the top of my bunk; sometime the cook had a clock in the kitchen.

Redirect examination:

I did not notice a'y light of any description.

Q. Did he strike a match?

A. I don't think he did; I didn't see no light of anything.

Q. Would you be able to say he did not?

A. I did not see no light. If I saw any sort of a light I would have thought there had been. I didn't see none.

The COURT. Did I understand you to say he sometimes took his clock into his bunk?

A. He did. He sets the alarm to wake up at 4; the alarm goes off at 4 and he gets up and does his duty; I don't know whether the alarm went off at 4 that morning.

*Testimony of John Olsen.*

JOHN OLSEN, called as a witness for the United States, having been duly sworn, testified as follows:

112 I was a sailor on the bark Hesper on the night of January 13th last. I know both Sparf and Hansen. When I turned into the forecastle that night Pandy and Westerling were already there in their bunks. Green came in afterwards.

At a *uq*arter to 11 o'clock that night Sparf came to me and called me and asked me to give him a hand to throw the captain overboard. He told me, "When we get the captain overboard we can take charge of the ship and run her for the Chillean shore and sink her and take the big boat and put ashore." I told him I would not have anything to do with it. Then he went and in a few minutes returned and asked Green the same question.

At a quarter to 12 o'clock Hansen came and called up for our watch, and we all turned out and put our clothing on and went on deck. The mate was then asking for 2nd mate.

Cross-examination:

The entire port watch left forecastle together. We all walked down the port side of the vessel together, and all reported to the 1st mate together. The starboard watch was then on the starboard side, all together

Did not see St. Clair on the port side at 8 bells, midnight. I waked no one, and alarmed no one when asked to give a hand in throwing the captain overboard. I am friendly with Green.

Redirect examination:

(Witness shown hatchet.) I saw hatchet; it was found under Thomas Green's bunk. St. Clair' bunk was over Green's bunk. The hatchet was on the floor beneath both bunks.

Mr. GARTER. I now offer in evidence the club, can and contents,
113 and hatchet, which have been marked for identification during the course of the trial. I understand there will be no question as to the identity of these articles, and no objection will be made as to their identity.

The COURT. Very well.

*Testimony of Thomas Price.*

THOMAS PRICE, called as a witness for the United States, having been duly sworn, testified as follows:

I am an analytical chemist. I have been engaged in that business all my life. I have been professor of chemistry at the Normal College, Swansea; professor of chemistry in the Toland Medical College.

I have examined hair in this box under the microscope and found that it compared with the hair of a human being. I believe it to be human hair. It corresponds with human hair in size, diameter, and general form.

On that hair I found blood which I would say might be the blood of a rat, the blood of a bear, the blood of a monkey, the blood of a dog, or the blood of a human being.

On the hatchet I found hairs which corresponded with the hair I found in the tin box, and also blood which corresponds with blood found by me on hair in the tin box.

I also found spots of blood on the club and the size of the *capuicles* corresponded in size with those on the hair and hatchet, namely, $\frac{1}{3200}$ of an inch. The blood on all three corresponded. I found one or two hairs on the club.

*Testimony of W. J. Coey.*

W. J. COEY, called as a witness for the United States, having been duly sworn, testified as follows, to wit:

114 I am registry clerk of the custom-house at San Francisco.

Q. Have you in your possession the registration of the bark esper?

A. Yes, sir.

Q. Please produce it.

A. At the present time the vessel is under enrollment.

Q. Find the book which shows the condition of this vessel between December 22nd, 1892, to and including January 13th, 1893.

A. This register was issued on the 19th of May, 1891, and remained in force up to April 19th, 1893. (Referring to book in *in* the hands of witness.)

It is on page 4. It is a record called a book of registered vessels of the San Francisco custom-house. This is a copy of the register. The register itself is supposed to be on board of the vessel. When in force the original register or certificate belongs on the vessel, but when the registration is surrendered it is surrendered to the custody of the custom-house. This document (in the hands of witness) is the certificate of register issued to the bark Helper and was surrendered on the 19th of April, owing to change of ownership in part. It is an official document and is in my custody as received by the collector under seal.

Mr. GARTER. I desire to introduce this document in evidence.

115 Mr. SMITH. Objected to as immaterial, irrelevant, and incompetent, and in no way establishes the nationality or the citizenship of the owner.

(Specification No. 23:)

The COURT. The objection is overruled.

(To which ruling the defendants then and there duly excepted and now tender their bill of exceptions thereto, which the court hereby signes, seales, settles, and allows.)

Said certificate was thereupon read in evidence and is in the usual form of certificates of registry.

The WITNESS. The surrender of that registration would be written across the face of the copy and endorsed on the back of the register, and we also make an abstract in our abstract books. The endorsements on the back are not official; we make that just to guide us in writing up our books, because on the issuance of this register it is charged up to the vessel. The abstract is forwarded to the Department.

Mr. GARTER. I ask leave to introduce page 4 of the book, endorsed on the back of it "534" copies of registers, May 13th, 1891, March 18th, 1893, custom-house.

Mr. SMITH. Objected to as not being the best evidence.

The COURT. The objection is overruled.

(Specification No. 24. To which ruling the defendant then and there duly excepted and now hereby tenders their bill of exceptions thereto, which the court signs, seals, settles, and allows.)

Said page was thereupon read in evidence and is in the usual form of certificates of registry.

116 Mr. GARTER. What is this kept for?

A. In case another register is issued to the vessel, we do not get this document confounded with the later one.

Q. Is that entry made by requirement in your office?

A. We always do. It is our customary way of keeping the date of surrender and has been the practice for years.

Mr. SMITH. Is that an official entry?

A. There is no signature attached to it. It is in my handwriting.

Q. It is simply one mode for your convenience?

A. Yes, sir?

Q. The same as made on the certificate of registration?

A. Exactly; so that we would not confound it with a later document.

Mr. GARBER. Is there anything in that office by which it can be shown that the registration was surrendered?

A. Yes, sir. The paper issued in lieu of that document would show that.

Q. Please turn to that.

A. There is the copy that was issued in lieu of the other one.

Mr. SMITH. That is the copy?

A. Yes, sir.

Q. The original of that is on board of the vessel?

A. No, sir. That has been surrendered also on account of change of ownership, which necessitates a change of papers; sometimes they change owing to trade; this would show on its face that it was issued in lieu of the other one. This book marked "534" copies of register, etc., marked United States Exhibit E, is an official record in the custom-house at San Francisco.

117

Mr. GARTER. I asked leave to introduce the entry found on page 12 of the book last referred to.

Mr. SMITH. That is a copy of the official register?

The WITNESS. We have always treated those books and documents as official.

Q. That is simply a copy?

A. Copy of the register.

Q. This is not the original registration?

A. No, sir; the certificate of register itself.

Mr. GARTER. That is generally delivered over to the vessel?

A. It is while it is in port.

Q. Is that here or in Washington?

A. I think it is here.

Q. Is that entry required to be made in this book? When a certificate is granted are you required to enter this into this book?

A. Yes, sir. It is numbered and a bond is given. The signatures in the book are not original signatures; they are copies, but we are required to keep copies of every transaction, and that is the only evidence we have in the office of granting a certificate during the time while the certificate is in force. The original certificates are not surrendered while in force, and they may remain in force for years. This is the official certificate of registration in the possession of the Government during the time of the life of the certificate and is the official record.

Mr. SMITH. There is not an original signature on that?

118 A. Yes, sir.

Mr. GARTER. I offer it in evidence.

Mr. SMITH. I object. They have the best evidence in their hands and ought to produce it.

The COURT. I overrule the objection.

(Specification No. 25. To which ruling the defendants then and there duly excepted, and now tender their bill of exceptions thereto, which the court hereby signs, seals, settles, and allows.)

Said entry, being page 12 before referred to, was then read in evidence and is in the usual form of certificates of registry.

Here the United States rested.

Whereupon, the case being closed after argument of counsel, the court instructed the jury as follows, to wit:

119 *Charge to the jury.*

The COURT. Gentlemen of the jury: This case is now about to be submitted to your consideration, and in that consideration the principles of law are as much an element as are the facts of the case; hence I invite your careful attention to the instructions I am about to give you.

The indictment is based upon section 5339 of the Revised Statutes, which provides, among other things, that "every person who commits murder upon the high seas or in any arm of the sea, or in any river, haven, creek, basin, or bay within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State, or who upon any such waters maliciously strikes, stabs, wounds, poisons, or shoots any other person, of which striking, stabbing, wounding, poisoning, or shooting such other person dies on land or at sea, within or without the United States, shall suffer death."

The indictment charges that the defendants, Hans Hansen, and Herman Sparf, and Thomas St. Clair, on the 13th day of January, 1893, on the high seas, on the bark Hesper, and within the admiralty jurisdiction of the United States, did kill and murder one Morris Fitzgerald.

To establish the offence charged in the indictment certain facts must therefore be proven by the prosecution with the strength of proof I shall hereafter define to you. These facts are that Morris Fitzgerald is
120 dead; that he was killed on the high seas, on the bark Hesper, in the manner and form described in the indictment by the defendants, either alone or in combination with Thomas St. Clair. It must also be proved, with the same degree I have indicated, that the bark Hesper was an American ship, sailing under an American flag, and that San Francisco was the first American port to which the defendants were brought after such killing.

These facts being shown, it will be necessary to establish also, with the strength of proof I have indic'ted, that the killing was a murder.

What, then, is murder? There are only two kinds of felonious homicide known to the United States. One is murder and the other is manslaughter. There are no degrees of murder. I mention this fact, gentlemen, lest your experience on State juries, with the State law, would lead you to confusion. Nor is it the province of a jury in the United States courts to fix the punishment for murder. That is fixed by the law, as I have already read to you, by death. The jury's province is to pass on the facts of the case, not to fix any sentence, as under the State law.

There is no definition of murder by any United States statute. We resort to the common law for that.

By common law murder is the unlawful killing of a human being in the peace of the State, with malice aforethought, either express or implied.

Malice, then, is an element in the offence, and discriminates it
121 from the other crime of felonious homicide which I have mentioned, to wit, manslaughter; that is, malice, express or implied, discriminates murder from the offence of manslaughter.

What is malice? It is not easy to define it in terms simpler than itself. It is somewhat technical in law, and is said to be express or implied. These terms, however, as Justice Field has observed, do not indicate different states of mind, but the same state of mind. The difference is one of proof, not of kind. Express malice exists when one, by deliberate premeditation and design, formed in advance to kill or to do bodily harm, the premeditation and design being implied from external circumstances capable of proof, such as lying in wait, antecedent threats, and concerted schemes against a victim.

Implied malice is an inference of the law from any deliberate and cruel set committed by one person against another. The two kinds of malice, therefore, to repeat, indicate but one state of mind, established in different ways, the one by circumstances showing premeditation of the homicide, the other by an inference of the law from the act committed; that is, malice is inferred when one kills another without provocation, or when the provocation is not great.

Manslaughter is the unlawful killing of a human being without malice either express or implied.

I do not consider it necessary, gentlemen, to explain it further, for if a felonious homicide has been committed, of which you are to be the judges from the proof, there is nothing in this case to reduce it below the
122 grade of murder. In other words, it may be in the power of the jury, under the indictment by which these defendants are accused and tried, of finding them guilty of a less crime than murder, to wit, manslaughter, or an attempt to commit murder, yet, as I have said in this case, if a felonious homicide has been committed at all, or which, I repeat, you are the judges, there is nothing to reduce it below the grade of murder.

The law desolves certain duties on the prosecution in a criminal case, clothes the defendant with certain presumptions, and requires a certain strength of proof of his guilt. For instance, the law does not require the defendant to prove himself innocent. It imposes the burthen on the prosecution to prove him guilty. In other words, the law presumes that each defendant is innocent, and this presumption should continue and prevail in your minds until you are satisfied from the evidence beyond a reasonable doubt of his guilt, and acting on this presumption you should acquit him, unless the evidence establishes his guilt beyond a reasonable doubt.

A reasonable doubt is that state of the mind which, after a full consideration of all the evidence, leaves your minds in that condition that you can not feel and abiding faith, amounting to a moral certainty, from the evidence, that the defendant is guilty of the crime charged against him, or that either of the defendants is guilty of the crime charged against them.

In a case like this—a criminal case—the amount of proof required
123 is different from the amount required in a civil case. In the latter—that is, in a civil case—a mere preponderance of evidence is necessary. In this case the proof must be beyond a reasonable doubt, as I have explained to you. Mere probabilities, therefore, are not sufficient, nor is it sufficient that upon the doctrine of chances that it is more probable that the defendant is guilty than not guilty. Nor should he be convicted on mere suspicion. The strength of proof must be such that it will

exclude any reasonable theory upon which he can be innocent; and you must find a verdict from the testimony in the case, unsided, unassisted, and uninfluenced by any opinion or presumption not founded upon the testimony.

As a matter of law, where a conviction for a criminal offence is sought upon circumstantial evidence alone, the Government must not only show by a preponderance of evidence that the alleged facts and circumstances are true, but they must be such facts and circumstance as are incompatible upon any reasonable hypothesis with the innocence of the accuses and incapable of explanation upon any reasonable hypothesis other than the guilt of the accused. And in this case, if all the facts and circumstances relied on by the Government to secure a conviction can be reasonably accounted for upon any reasonable theory consistent with the innocence of the defendant, you should acquit him. When I say "defendant" I mean either of the defendants. I have adopted that form for convenience.

124 If there is any one single fact proved to your satisfaction by a preponderance of evidence which is inconsistent with his guilt, this is sufficient to raise a reasonable doubt, and you should acquit him.

You are the exclusive judges of the credibility of the witnesses, and in judging of their credibility you have a right to take into consideration their prejudices, motives, or feelings of revenge, if any such have been proven or shown by the evidence in the case; if you believe from the evidence that any witness or witnesses have knowingly and willfully testified falsely as to any material fact or point, you are at liberty to disregard entirely the testimony of such witness or witnesses.

As to the statement made by the defendants, or either of them, or by any other person in the hearing and presence of either, the same are to to be received with care and caution, and, besides being satisfied that the witness who testifies to the statements speaks truly, you must be satisfied that the witness could not be or was not mistaken as to the substances o the statement.

If you believe from the evidence that Edward Larsen or Thomas Green, or either of them, were accomplices with the defendants in the commission of the acts charged in the indictment, then I instruct you that you are to set upon their testimony with care and caution and subject it to a careful examination in the light of all the other evidence in the case, and you ought, further, not to convict upon their testimony alone unless you are satisfied beyond any reasonable doubt of its truth.

125 If you believe from the evidence that the witness Edward Larsen and Thomas Green, or either of them, or any other person, were induced to become witnesses and testify by any promise of immunity from punishment or by any hope held out to them from any one that it would go easier with them in case they would disclose who their confederates were or in case they implicated some one else in the crime, you should take this into consideration in determining the weight to be given to their testimony, and it should be received with caution and scrutinized with care.

I further instruct you that the confessions of a prisoner out of court and in custody, made to persons having no authority to examine him,

should be acted upon and received by you with great care and caution. Proof may be too easily procured, words are often misreported through ignorance, inattention, or malice, and are extremely liable to misconstruction, and are rarely sufficient to warrant a conviction on account of the great danger of mistake and the fact that the mind of the prisoner himself may be oppressed by the calamity of his situation or influenced by motives of hope or fear to make an untrue confession.

You are further instructed that the alleged confessions of the defendants to the witnesses Edward Larsen and Thomas Green, or to anyone else, are to be received with caution and scrutinized with care, and are to be considered in view of all the facts and circumstances of the case, and you are also to consider, in weighing the confessions alleged to have been made by the defendants to them, to consider the zeal, if any has
126 been shown by the witnesses, to connect the defendants with the commission of the alleged offence, either by reason of the disposition of the witnesses to rely on slight grounds of suspicion or by reason of any other motive which may be shown by the evidence.

In considering the weight to be given to the alleged confessions of the defendants you are to consider their condition at the time alleged confessions were made, the fact that they had been charged with crime, and how they were confined in custody, and you are the judges as to whether said confessions were voluntary, or whether any inducements were held out to them by the captain or by anyone else.

While the Revised Statutes of the United States provides that a person charged with crime may testify in his own behalf, he is under no obligation to do so, and the statute expressly declares that his neglect to testify shall not create any presumption against him under any circumstances whatever.

At common law every person present at a murder, willingly aiding or abetting its perpetration, is guilty of murder, and may be indicted and convicted as principal in the first degree.

Therefore, if you believe from the evidence, under the instructions I have given you, that Norris Fitzgerald was killed as charged in the indictment, and that neither of the defendants did the act alone, but was present, willingly aiding or abetting its perpetration, he is guilty as though he did the act alone. But, on the other hand, if the evidence fail to show
127 beyond a reasonable doubt that either of the defendants was present, or if either was present and he did not know that Fitzgerald was to be assaulted or killed, or did not willingly aid or abet his killing, you should acquit such defendant.

Gentlemen, I have given you these instructions as carefully as I could, avoiding all references to the testimony, but I do not wish to be misunderstood, and out of abundant caution I say further to you, in giving you these instructions, I may by accident have assumed facts to be proven; if so, you must disregard the assumption. It is not my purpose, nor is it my function, to assume any fact to be proven, nor to suggest to you that any fact has been proven. You are the exclusive judges of the facts. No matter what assumption may appear during the course of the trial in any ruling of mine, or what may appear in any one of these instructions, you are to take this case and consider it, and remember you are the tribunal to which the law has referred the case and whose judgment the law wants on the case.

When you retire to the jury room you will select one of your number foreman. After you have deliberated upon the case and agreed upon a verdict you will return into court. The form of your verdict will be, if you find the defendants guilty, "We, the jury, find the defendants guilty of murder." If you find them not guilty, your verdict will be, "We, the jury, find the defendants not guilty," or if you find one guilty, and not the other, your verdict will be accordingly.

Mr. GARTER. I ask your honor to instruct the jury that they may find separate verdicts as to each one of the defendants, as, for instance, one guilty and the other not guilty.

128 The COURT. I have already done so. To avoid any misunderstanding, gentlemen, you may, under the evidence, find one of the defendants guilty and the other not guilty. If you find one not guilty, your verdict will be in his favor. If you find both guilty, your verdict will be accordingly; or if you find both innocent, your verdict will be accordingly.

Defendants then requested the court to give each of the following instructions, to wit:

1. You are instructed that in all criminal causes the defendants may be found guilty of any offense the commission of which is necessarily included in that with which he is charged in the indictment, or may be found guilty of an attempt to commit the offense so charged, provided that such attempts be itself a separate offense.

2. Under an indictment charging murder the defendants may be convicted of murder, of manslaughter, or of an attempt to commit either murder or manslaughter.

3. You are instructed that under the indictment in this case the defendants may be convicted of murder or manslaughter or of an attempt to commit murder or manslaughter, and if, after a full and careful consideration of all the evidence before you, you believe beyond a reasonable doubt that the defendants are guilty either of manslaughter or of an assault with intent to commit murder or manslaughter you should so find your verdict.

129 (Specifications 34, 35, and 36, to which refusal of the court to give said instructions, and each of them, defendants duly excepted, now assign said refusal as error, and hereby tender their bill of exceptions, which the court hereby signs, seals, settles, and allows.)

Mr. SMITH. We desire to except to the instruction on manslaughter, that is, with reference to the testimony in the case, and hereby tender our bill of exceptions, which the court signs, seals, settles, and allows. If your honor has refused to give any instructions that we asked for, we except to the refusal. We except to your honor's not giving the third, fourth, and fifth instructions asked for.

The COURT. I think I have given them substantially.

I hand you, gentlemen, these forms of verdict which are in accordance with the instructions of the court.

(The jury retired at 2 minutes of 3 and returned into court at 5:10 p. m.)

The COURT. Gentlemen of the jury, have you agreed upon a verdict?

The FOREMAN. There is one of us who wishes to be instructed by your honor as to certain points upon the question of United States marine laws in regard to murder on the high seas.

The COURT. The instruction which I gave you, gentlemen, in regard to the law upon which the indictment was based was section 5339 of the Revised Statutes, which I will read to you again.

A JUROR. Your honor, I would like to know in regard to the interpretation of the laws of the United States in regard to manslaughter,
130 as to whether the defendants can be found guilty of manslaughter, or that the defendants must be found guilty?

The COURT. I will read the section to you and see if that touches the proposition. The indictment is based upon section 5339, which provides, among other things, "that every" person who commits murder upon the high seas or in any arm of the sea, or in any river, haven, creek, basin or bay, within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State, or who, upon any such waters, maliciously strikes, stabs, wounds, poisons, "or shoots any other person, or which striking, stabbing, wounding, poisoning or shooting such other person dies on land or at sea, within or without the United States, shall suffer death." Hence, that is the penalty for the offense described in the indictment.

I have given you the definition of murder. If you remember it, you will connect it with these words: "Every person who commits murder upon the high seas, or in any arm of the sea, or in any river, haven," etc.

A JUROR. Are the two words "aiding" or "abetting" defined?

The COURT. The words "aiding" or abetting" are not defined, but I have instructed you as to the legal effect of aiding and abetting, and this you should accept as law. If I have made an error there is a higher tribunal to correct it.

A JUROR. I am the spokesman for two of us. We desire to clearly understand the matter. It is a barrier in our mind to our determining the matter. The question arising amongst us is as to aiding and
131 abetting. Furthermore, as I understand, it must be one thing or the other. It must be guilty or not guilty.

The COURT. Yes; under the instructions I have given you. I will read them to you again, so as to be careful and that you may understand.

Murder is the unlawful killing of a human being in the peace of the State, with malice aforethought, either express or implied. I defined to you what malice was, and I assume you can recall my definition to your minds.

Manslaughter is the unlawful killing of a human being without malice, either express or implied. I do not consider it necessary to explain it further. If a felonious homicide has been committed by either of the defendants, of which you are to be the judges from the proof, there is nothing in this case to reduce it below the grade of murder.

A JUROR. Then, as I understand your honor clearly, there is nothing about manslaughter in this court?

The COURT. No; I do not wish to be so understood. A verdict must be based on evidence, and in a proper case a verdict for manslaughter may be rendered.

A JUROR. A crime committed on the high seas must have been murder, or can it be manslaughter?

The COURT. In a proper case it may be murder or it may be manslaughter, but in this case it can not be properly manslaughter. As I have

said, if a felonious homicide has been committed the facts of the case do not reduce it below murder. Do not understand me to say that manslaughter or murder has been committed. That is for you gentle-
132 men to determine from the testimony and the instructions I have given you. I will say to you gentlemen, any time you desire your supper or dinner the marshal will take you to a place where you can obtain the same.

Mr. SMITH. We take an exception.

A JUROR. We have got to bring a verdict for either manslaughter or murder?

The COURT. Do not misunderstand me. I have not said so.

The JUROR. I know you have not.

The COURT. I can not direct you what conclusion to come to from the facts. I direct you only as to the law. A judgment on the facts is your province.

Mr. GARTER. May I ask the court to instruct this jury that in cases where persons are being tried upon a charge of murder, and the facts proven at their trial show that the defendants are guilty of manslaughter, under an indictment they may find him guilty of manslaughter, as a general rule; but, however, if the facts show that the defendants have been guilty of murder, and that in this case there is no evidence tending to establish the crime or offence of manslaughter——

Mr. SMITH. It is the province of the jury.

The COURT. I have already so instructed the jury. I have endeavored to make myself understood.

A JUROR. If we bring in a verdict of guilty that is capital punishment?

The COURT. Yes.

A JUROR. Then there is no other verdict we can bring in except guilty or not guilty.

133 The COURT. In a proper case a verdict for manslaughter may be rendered, as the district attorney has stated; and even in this case you have the physical power to do so; but as one of the tribunals of the country a jury is expected to be governed by law, and the law it should receive from the court.

A JUROR. There has been a misunderstanding amongst us. Now it is clearly interpretated to us, and no doubt we can now agree on certain facts.

(The jury then retired at 5.25 p. m. and returned into court at 9 o'clock p. m.)

The CLERK. Gentlemen, have you agreed upon a verdict?

The FOREMAN. We have.

The CLERK. Defendants, face the jury. The jury, face the defendants. What say you, gentlemen of the jury, are the defendants guilty or not guilty?

The FOREMAN. Guilty.

The COURT. Read the verdict, Mr. Foreman, from where you stand.

The FOREMAN. We, the jury, find the defendants guilty as charged. Signed John J. Haley.

The COURT. You had better read it again, Mr. Foreman.

The FOREMAN. We, the jury, find the defendants guilty as charged.

The COURT. Read it again. I think you have made a mistake.

The FOREMAN. I do not see very well. We, the jury, find the defendants guilty of murder.

The COURT. Record the verdict, Mr. Clerk.

134 The CLERK. Gentlemen of the jury, hear your verdict as it stands recorded: U. S. circuit court, ninth judicial northern district of California. The United States vs. Herman Sparf and Hans Hansen. Criminal, No. 2173: "We, the jury, find the defendants guilty of murder. John J. Haley, foreman." Is that your verdict, gentlemen?

The JURY. Yes.

The COURT. Do you desire the jury polled?

Mr. SMITH. Yes, sir.

(The clerk then polled the jury, who declared the above to be their verdict.

To which verdict of the jury the defendants then and there duly excepted, and now present to the court their bill of exceptions thereto, which the court hereby signs, seals, settles, and allows.)

That thereafter and on the day of 1893, and prior to the pronouncing of judgment and sentence under said verdict on the defendants, they, said defendants, in open court, moved the court for a new trial of said action, and that the verdict be set aside upon the following grounds, to wit:

1st. Insufficiency of the evidence to justify the verdict, and that the said verdict was against law and the evidence.

2nd. Errors in law occurring at and during the trial and duly excepted to by the defendants.

That said court, after argument of counsel and upon the presentation of the minutes of the court as hereinbefore set out, denied said motion to set aside said verdict and for a new trial; and the defendants then and there excepted to the ruling of the court, and now assigns the same as

135 error and present this their bill of exceptions thereto, which the court, hereby signs, seals, settles, and allows.

And now the time for preparing, serving, and filing defendants' bill of exceptions on motion for a new trial and upon application for writ of error to the Supreme Court of the United States, should such application be made, and upon writ of error to said Supreme Court of the United States, should such writ be granted, having been duly and regularly and as required by law evidence and continued to this day, the defendants hereby ask that the verdict of the jury and the judgment therein entered and the sentence pronounced be vacated and set aside, upon the following grounds, to wit:

*Assignment of error.*

SPECIFICATION A.

The circuit court of the northern district of California erred in overruling the demurrer interposed by the plaintiffs in error to the indictment filed against them.

SPECIFICATION B.

The court erred in denying and overruling the defendant's challenge and objection to the entire panel and to the persons summoned to act as

jurors in said court, on the ground that the names of 300 persons qualified to act as jurors had not been placed in the box at the beginning of or during the term of said court (at which the trial of defendants was had).

SPECIFICATION C.

The court erred in denying and overruling the defendants' challenge and objection to the 12 persons and each of them placed in the
136 jury box to be examined touching their qualifications to act as jurors, upon the ground that the names of 300 persons qualified to act as jurors had not been placed in the box provided for that purpose at the beginning or *or* during the time of said court at which the trial of defendants was had.

SPECIFICATION D.

The court erred in compelling the defendants, against the defendants' protest and objection, to exercise the right of peremptory challenge immediately upon the conclusion of the examination of each juror touching his qualifications to act as a juror, and in not allowing the defendants to examine the entire 12 men in the box touching their qualifications to serve as jurors before exercising the right of peremptory challenge.

SPECIFICATION E.

The court erred in overruling defendants' objection and denying defendants' challenge to the swearing in as jurors the 12 persons who tried said cause as jurors, upon the ground that the names of 300 persons qualified to act as jurors had not been placed at the beginning of or during the time of said court, where the trial was had, in the box provided for that purpose from which trial jurors were to be publicly drawn.

Specification No. 1. The court erred in overruling the defendants' objection to the question propounded to the witness, F. O. Sodergren :
137 "Q. Will you state what flag she carried at that time?" and in allowing this answer thereto, as follows :

"A. She carried the American flag."

Specification number 2. The court erred in overruling the defendants' objection to the following question, propounded to the witness, F. O. Sodegren :

"Q. Between the 13th day of January, 1893, and for ten days prior to that time, did you see any vessels or any boats while you were on your voyage?" and in allowing the answer theret' :

"A. I saw none."

Specification number 3: The court erred in overruling defendants' objection to the following question, propounded to the witness, F. O. Sodegren :

"Q. For ten days afterward, after the 13th day of January, or about eighteen days after the occurrence, and up to the time you got to Tahiti, how many vessels or boats did you see?" and in allowing this answer thereto :

"A. I saw none."

Specification number 4. The court erred in overruling the defendants' objection to the following question, propounded to the witness, F. O. Sodegren:

"Q. As to the hair which you saw, and to which you have
138 referred heretofore, what would you say about its being the hair of the second mate?" and in permitting the answer theret':

"A. I understood it to be the second mate's hair. How he looked when I saw it on his head, you mean, or the hair I found?"

Specification number 5. The court erred in overruling the defendants' objection to the following *objection*, propounded to the witness, Edward Larsen:

"Q. Did you see St. Clair again during that watch?" and in allowing this answer thereto:

"A. Yes, sir."

Specification number 6. The court erred in overruling the defendants' objection to the following question, propounded to the witness, Edward Larsen:

"Q. What, if anything, did he say to the mate?" and in allowing this answer thereto:

"A. St. Clair said to the mate that there was something carried away forward, and the second mate followed him forward. I afterwards heard the second mate sing out twice, and the dog barked at the same time. I saw Herman Sparf and Hans Hansen again that night in the forecastle. They said nothing to me at that time."

Specification number 7. The court erred in overruling the defendants' objection to the following question, propounded to the witness, Edward Larsen:

"Q. Were you ever present before the time the mate disap-
139 peared from the Hesper when the subject of killing the mate or the captain, or anybody on board of the Hesper, was discussed, when Herman Sparf, Hans Hansen, and Thomas St. Clair was present?" and in allowing this answer thereto:

"A. Yes, sir."

Specification number 8. The court erred in overruling the objection by the defendant to the following question, propounded to the witness, Edward Larsen:

"Q. State what was said;" and in allowing this answer thereto:

"A. It was one day, sir, when the captain was gone into the cabin, sir. I heard Herman Sparf call the captain a son-of-a-bitch, and he said he had to be killed and we would be our own boss and take the ship from him, and take the ship and go ashore, sir; I heard Herman Sparf say that in the forecastle, sir."

Specification number 9. The court erred in overruling the defendants' objection to the following question, propounded to the witness, Thomas Green:

"Q. Did you see any blood on St. Clair when Hansen and Sparf were near him?" and in allowing this answer thereto:

"A. I never saw any blood on him."

Specification number 10. The court erred in overruling the defendants' motion to exclude the testimony of the witness Thomas Green as to the appearance of Thomas St. Clair for the purpose of establishing the corpus delicti of this case.

140 Specification number 11. The court erred in overruling defendants' objection to the following question propounded to the witness Thomas Green:

"Q. At the time you met St. Clair coming out of the forecastle, to which you have reference, I will ask you what his appearance was, as to whether there was any blood upon him or any part of his person?" and in allowing this answer thereto:

"A. I don't know what clothes he had on, sir. I never saw any blood on him, not at that time."

Specification number 12. The court erred in overruling the defendants' motion to strike out the following question, and answer thereto, propounded to the witness Thomas Green:

"Q. Where did you go, when you left there, from Tahiti?" and in allowing this answer thereto:

"A. From Tahiti to San Francisco, California."

Specification number 13. The court erred in overruling the defendants' objection to the following question propounded to the witness Thomas Green:

"Q. Did that vessel stop at any other place during the voyage from Tahiti to San Francisco?" and in allowing this answer thereto:

"A. No, sir; she did not stop at any other place."

Specification number 14. The court erred in overruling the defendants' objection to the following question propounded to the witness Thomas Green:

141 "Q. Did you have any conversation with Hansen and Sparf about the matter of the homicide of the second mate, Morris Fitzgerald, while on the Tropic Bird, and while on your way from Tahiti to San Francisco?" and in allowing this answer thereto:

"A. Yes, sir. We were all under arrest at the time, in irons and in confinement; that is, Sparf, Hansen, Larsen, and myself. There were no promise made to either Sparf or Hansen to tell anything. No inducements were offered them to tell anything."

Specification number 15. The court erred in overruling the defendants' objection to the following question propounded to the witness Thomas Green:

"Q. State what was said by the defendants?" and in allowing this answer thereto:

"A. While on the voyage from Tahiti to San Francisco we were confined in the jail together, and one day while we were on it I asked Hansen 'what right he had to let go of the royal sheet;' he said, 'to get the second mate forward.' I said, 'what for;' St. Clair wanted to give him a hiding, but he never thought the man was going to get murdered.

"When St. Clair left the wheel, he says, 'I will tell you the whole of it.'"

Specification 16. The court erred in overruling the objection of the defendants to the following question propounded to the witness Thomas Green.

142 "Q. Can you state what the discipline or rule upon the Hesper was during the voyage about the men having weapons?" and in allowing the answer thereto:

"A. The rule is that no weapons are permitted on board the ship, in the hands of any of the crew in the forecastle."

Specification number 17. The court erred in overruling the defendants' objection to the following question propounded to the witness F. O. Sodegren:

"Q. Now, captain, state what was said to you by Hansen in that conversation?" and in allowing this answer thereto:

"A. After he had stated if it had not been for him I should not have been alive at that time, when he spoke to me that day, I listened to him, and I then asked him what possessed him, or 'what did you want to kill me for? Had you men not been well fed; have you not been well treated?' He said yes; he did not know; he thought it was merely a crazy hallucination that came into their heads by St. Clair telling them that all California vessels, as a rule, carried their outward freight back home in money, which would be, perhaps, $12,000 or $14,000, and that money they wanted to take, and St. Clair planned the whole thing how it was to get that money; and that particular night the time was set at 10 o'clock to commence, on the 13th of January. Hansen said that St. Clair had a hatchet of his own, a new hatchet of his own, which he bought in Newcastle, which he gave to Sparf."

Specification number 18. The court erred in overruling the objection of the defendants to the question propounded to the witness Edward Larsen:

143 "Q. What did he say, if anything, at that time?" and in allowing this answer thereto:

"A. He said that Hansen wanted to take the wheel."

Specification number 19 The court erred in overruling the objection of the defendants to the following question propounded to the witness Edward Larsen:

"Q. State what it was that was said?" and in allowing this answer thereto:

"A. Hansen said he went down and slacked the royal sheet. St. Clair went aft and called the second mate forward. As he came forward the the second mate looked up at the royal; the royal was flapping; at the same time St. Clair had an axe in his hand, and he said 'Now is the time, boys,' and he struck him. The second mate fell and grabbed hold of Hansen's coat and hitting him all to pieces. Hansen and Sparf were standing on the other side of the gangway, looking at it. Hansen was scared, and so was Sparf, and Hansen said to Sparf, 'Let us take the man and throw him overboard,' and Herman took hold of the man's shoulder and Hansen by the feet, and they took the man and threw him over the side."

Specification number 20. The court erred in overruling the defendants' objection to the following question propounded to the witness Pandy Zacharia:

"Q. Did you see St. Clair that night, on the port side of the ship, throw some clothes overboard?" and in allowing this answer thereto:

144 "A. I saw him do that."

Specification number 21. The court erred in overruling the objection of the defendants to the following question propounded to the witness Ah Hong:

"Q. Did you give that hatchet to St. Clair that night?" and in allowing this answer thereto:

"A. St. Clair asked me to lend him the axe. I said, 'What do you want it for?' He said, 'I want to chop wood.' St. Clair took the axe away."

Specification number 23. The court erred in permitting the certificate of registration of the bark Hesper to be introduced and allowed in evidence.

Specification number 24. The court erred in permitting page 4 of the registry book, endorsed on the back of it "534" copies of registers, May 13th, 1891, March 18th, 1893, custom-house, to be introduced in evidence.

Specification number 25. The court erred in permitting page 13 of that book to be allowed and introduced in evidence.

Specification number 26. The court erred in charging the jury as follows:

"What, then, is murder? There are only two kinds of felonious homicide known to the laws of the United States. One is murder and the other is manslaughter."

145 Specification number 27. The court erred in charging the jury as follows:

"By common law, murder is the unlawful killing of a human being in the peace of the State, with malice aforethought, either express or implied.

"Malice, then, is an element in the offense and discriminates it from the other crime of felonious homicide which I have mentioned, to wit:

"Manslaughter, that is malice express or implied, discriminates murder from the offense of manslaughter"

Specification number 28. The court erred in charging the jury as follows:

"Manslaughter is the unlawful killing of a human being without malice either express or implied."

Specification number 29. The court erred in charging the jury as follows:

"I do not consider it necessary, gentlemen, to explain it further, for if a felonious homicide has been committed, of which you are to be the judges from the proof, there is nothing in this case to reduce it below the grade of murder. In other words, it may be in the power of the jury under the indictment by which these defendants are accused and tried of finding them guilty of a less crime than murder, to wit, manslaughter, or an attempt to commit murder; yet, as I have said in this case, if a felonious homicide has been committed at all, of which I repeat you are the judges, there is nothing to reduce it below the grade of murder."

Specification number 30. The court erred in charging the jury as follows:

146 "When you retire to your jury room you will select one of your number foreman. After you have deliberated upon the case and agreed upon a verdict, you will return into court. The form of your verdict will be, if you find the the defendants guilty, 'We, the jury, find the defendants guilty of murder.' If you find them not guilty your verdict will be, 'We, the jury, find the defendants not guilty;' or if you find one guilty and not the other, your verdict will be accordingly."

Specification number 31. The court erred in its response to the following question propounded by a juror:

"JUROR. I am the spokesman for two of us. We desire to clearly understand the matter. It is a barrier in our mind to our determining

the matter. The question arising among us as to aiding and abetting. Furthermore as I understand it must be one thing or the other. It must be either guilty or not guilty.

147 "The COURT. Yes, under the instructions I have given you. I will read them to you again so as to be careful and that you may understand.

"Manslaughter is the unlawful killing of a human being without malice either express or implied. I do not consider it necessary to explain it further. If a felonious homicide has been committed by either of the defendants, of which you are to be the judges from the proof, there is nothing in this case to reduce it below the grade of murder."

Specification 32. The court erred in charging the jury in response to this question of a juror:

"JUROR. A crime committed on the high seas must have been murder, or can it be manslaughter?

"The COURT. In a proper case it may be murder, or it may be manslaughter, but in this case it can not be properly manslaughter. As I have said, if a felonious homicide has been committed the facts of the case do not reduce it below murder."

Specification No. 33. The court erred in charging the jury in response to this question of a juror:

"JUROR. Then there is no other verdict we can bring in except guilty or not guilty?

"The COURT. In a proper case a verdict for manslaughter may be rendered as the district attorney has stated and even in this case you have the physical power to do so, but as one of the tribunals of the country

148 a jury is expected to be governed by law and the law it should receive from the court."

Specification No. 34. The court erred in refusing to instruct the jury as follows, as requested by defendants:

"In all criminal causes, the defendant may be found guilty of any offense, the commission of which is necessarily included in that with which he is charged in the indictment, or the defendant may be found guilty of an attempt to commit the offense so charged, provided that such attempt be itself a separate offense."

Specification No. 35. The court erred in refusing to instruct the jury at the request of the defendants, as follows:

"That under an indictment charging murder, the defendant may be convicted of murder, of manslaughter, or an attempt to commit either murder or manslaughter."

Specification No. 36. The court erred in refusing to instruct the jury at the request of the defendants, as follows:

"That under the indictment in this case, the defendants may be convicted of murder, or manslaughter, or of an attempt to commit murder or manslaughter, and if after a full and careful consideration of all the evidence before you you believe beyond a reasonable doubt that the defendants are guilty, either of manslaughter or of an assault with intent to commit murder or manslaughter, you should so find your verdict."

149 Specification No. 37. The verdict of the jury was erroneous.

Specification No. 38. The court erred in denying defendants' motion for a new trial.

And now, that justice and right may be done, defendants pray that the foregoing bill of exceptions be signed, sealed, settled, and allowed and certified as full, true, and correct.

F. J. KIERCE,
JAMES SMITH,
*Attorney for Defendants.*

I hereby sign, seal, settle, and allow the foregoing bill of exceptions and hereby certify the same to be full, true and correct, and to fully, truly and correctly set forth all the proceedings had in the above entitled matter.

Dated November 23rd, 1893.

(Signed) J. MCKENNA,
*United States Circuit Judge, in and for the 9th Circuit, Northern District of California.*

(Indorsed): Filed Nov. 22, 1893. W. J. Costigan, clerk.

150 In the circuit court of the United States, northern district of California.

UNITED STATES OF AMERICA, COMPLAINANT,
*vs.*
HERMAN SPARF AND HANS HANSEN, DEFENDANTS.

*Petition of defendants, Herman Sparf and Hans Hansen, for an order allowing a writ of error.*

Herman Sparf and Hans Hansen, the defendants in the above-entitled cause, feeling themselves aggrieved by the verdict of the jury and the judgment entered on the 18th day of September, 1893, in pursuance of said verdict, whereby it was ordered, adjudged, and decreed that the defendants be taken by the marshal of the northern district of California and confined in the prison in the city and county of San Francisco until the 24th day of November, 1893, and on said day be by said marshal hung by the neck until they shall be dead, between the hours of one and four in the afternoon of said day, come now by J. F. Smith and F. J. Kierce, their attorneys, and petition this court for an order allowing said defendants to prosecute a writ of error to the honorable the Supreme Court of the United States, under and according to the laws of the United States in that behalf made and provided; and that upon the allowance of said writ of error all further proceedings in this court be suspended and
151 stayed until the determination of said writ of error by the United States Supreme Court.

Defendants herewith file their bill of exceptions herein, together with their specifications and assignments of error, to which bill of exceptions and specifications and assignments of error reference is hereby specially made for the purposes of this application. Reference is hereby also made to the entire record in the case at this date on file herein.

Dated November 23rd, 1893.

F. J. KIERCE,
JAMES F. SMITH,
*Attorneys for defendants, Herman Sparf and Hans Hansen.*

(Endorsed:) Filed November 22d, 1893. W. J. Costigan, clerk.

152 *Assignment of errors.*

IN THE UNITED STATES SUPREME COURT.

HERMAN SPARF AND HANS HANSEN, Plaintiffs in error.
*vs.*
UNITED STATES OF AMERICA, Defendant in error.

Now comes Herman Sparf and Hans Hansen, the plaintiffs in error herein, by F. J. Kierce and J. F. Smith, their attorneys and counsel, and particularly specify the following as the errors upon which they and each of them will rely and which they and each of them will urge upon the writ of error in the above-entitled cause, to wit: Errors in law occurring at the trial and duly excepted to by defendants, as follows:

Specification A. The circuit court of the northern district of California erred in overruling the demurrer interposed by the plaintiffs in error to the indictment filed against them.

Specification B. The court erred in denying and overruling the defendants' challenge and objection to the entire panel and to the persons summoned to act as jurors in said court, upon the ground that the names of 300 persons qualified to act as jurors had not been placed in the box at the beginning of or during the term of said court at which the trial of defendants was had.

Specification C. The court erred in denying and overruling the defendants' challenge and objection to the 12 persons and each of them placed in the jury box to be examined touching their qualifications to act as jurors, upon the ground that the names of 300 persons qualified to act as jurors had not been placed in the box provided for that purpose at the beginning of or during the term of said court at which the trial of defendants was had.

153 Specification D. The court erred in compelling the defendants, against defendants' protest and objection, to exercise the right of peremptory challenge immediately upon the conclusion of the examination of each juror touching his qualifications to act as a juror, and in not allowing the defendants to examine the entire twelve men in the box touching their qualifications to serve as jurors before exercising the right of peremptory challenge.

Specification E. The court erred in overruling defendants' objection and denying defendants' challenge to the swearing in as jurors the twelve persons who tried said cause as jurors, upon the ground that the names of three hundred persons qualified to act as jurors had not been placed at the beginning of or during the term of said court at which the trial was had in the box provided for that purpose from which trial jurors were to be publicly drawn.

Specification No. 1. The court erred in overruling the defendants' objection to following question, propounded to the witness, F. O. Sodegren:

"Q. Will you state what flag she carried at that time;" and in allowing the answer thereto:

"A. She carried the American flag."

Specification No. 2. The court erred in overruling the defendants' objection to the following question, propounded to the witness, F. O. Sodegren:

"Q. Between the 13th day of January, 1893, and for ten days prior to that time, did you see any vessels or any boats while you were on your voyage?" and in allowing the answer thereto:

"A. I saw none."

Specification number 3. The court erred in overruling defendants' objection to the following question, propounded to the witness, F. O. Sodegren, and in allowing the answer thereto:

"Q. For ten days afterwards, after the 13th day of January, or
154 about eight days after the occurrence, and up to the time you got to Tahiti, how many vessels or boats did you see?"

"A. I saw none."

Specification number 4. The court erred in overruling the defendants' objection to the following question, propounded to the witness, F. O. Sodegren, and in allowing the answer thereto:

"Q. On the 13th day of January, 1893, how many boats or vessels other than the Hesper did you see?

"Captain, in asking you those questions I will explain to you that—no; I will let the question stand without any explanation. As to the hair which you saw, and to which you have referred heretofore, what would you say about its being the hair of the second mate?"

"A. I understood it to be the second mate's hair. How he looked when I saw it on his head, you mean, or the hair I found?"

Specification number 5. The court erred in overruling the defendants' objection to the following question, propounded to the witness, Edward Larsen, and in allowing the answer thereto:

"Q. Did you see St. Clair again during that watch?"

"A. Yes, sir."

Specification number 6. The court erred in overruling the defendants' objection to the following question, propounded to the witness, Edward Larsen, and in allowing the answer thereto:

Q. "What, if anything, did he say to the mate?"

Specification number 7. The court erred in overruling the defendants' objection to the following question, propounded to the witness, Edward Larsen, and in allowing the answer thereto:

"Q. Were you ever present before the time the mate disappeared from the Hesper when the subject of killing the mate or the captain, or any body on board the Hesper, was discussed, when Herman Sparf, Hans Hansen, and Thomas St. Clair was present?"

155 "A. Yes, sir."

Specification number 8. The court erred in overruling the defendants' objection to the following question propounded to the witness Edward Larsen, and in allowing the answer thereto:

"Q. State what was said?"

"A. It was one day, sir, when the captain was gone into the cabin, sir, I heard Herman Sparf call the captain a son-of-a-bitch, and he said he had to be killed, and we would be our own boss and take the ship from him, and take the ship and go ashore, sir."

Specification number 9. The court erred in overruling the defendants' objection to the following question propounded to the witness Thomas Green, and in allowing the answer thereto:

"Q. Did you see any blood on St. Clair when Hansen and Sparf were near him?"

"A. I never saw any blood on him."

Specification number 10. The court erred in overruling the defendants' motion to exclude the testimony of the witness Thomas Green, as to the appearance of Thomas St. Clair for the purpose of establishing the corpus delicti of this case.

Specification number 11. The court erred in overruling defendants' objection to the following question propounded to the witness Thomas Green, and in allowing the answer thereto:

"Q. At the time you met St. Clair coming out of the forecastle to which you have reference, I will ask you what his appearance was as to whether there was any blood upon him or any part of his person?"

"A. I don't know what clothes he had on, sir. I never saw any blood on him, not at that time."

Specification number 12. The court erred in overruling the
156 defendants' motion to strike out the following question and answer thereto, propounded to the witness Thomas Green:

"Q. Where did you go when you left there from Tahiti?"

"A. From Tahiti to San Francisco, California."

Specification number 13. The court erred in overruling the defendant's objection to the following question propounded to the witness Thomas Green, and in allowing the answer thereto:

"Q. Did that vessel stop at any other place during the voyage from Tahiti to San Francisco."

"A. No, sir; she did not stop at any other place."

Specification number 14. The court erred in overruling defendants objection to the following question propounded to the witness Thomas Green and in allowing the answer thereto:

"Q. Did you have any conversation with Hansen and Sparf about the matter of the homocide of the second mate, Morris Fitzgerald, while on the Tropic Bird and while on your way from Tahiti to San Francisco?"

"A. Yes, sir. We were all under arrest at the time, in irons, and in confinement, that is Sparf, Hansen, Larsen, and myself. There were no promises made to either Sparf or Hansen to tell anything. No inducements were offered them to tell anything."

Specification number 15. The court erred in overruling the defendants' objection to the following question propounded to the witness Thomas Green, and in allowing the answer thereto:

"Q. State what was said by the defendants?"

"A. While on the voyage from Tahiti to San Francisco, we were confined in the jail together, and one day while we were on it I asked Hansen 'what right he had to let go of the royal sheet' he said 'to get the second mate forward.' I said 'what for?' 'St. Clair wanted to give him a hiding, but he never thought the man was going to get murdered.

"'When St. Clair left the wheel, he says, 'I will tell you the
157 whole of it.'"

Specification 16. The court erred in overruling the objection of the defendants to the following question propounded to the witness Thomas Green, and allowing the answer thereto:

"Q. Can you state what the discipline or rule upon the Hesper was, during the voyage about the men having weapons?"

"A. The rule is that no weapons are permitted on board the ship in the hands of any of the crew in the forecastle."

Specification 17. The court erred in overruling the defendants objection to the following question propounded to the witness F. C. Sodegren, and allowing the answer thereto:

"Q. Now, captain, state what was said to you by Hansen in that conversation?"

"A. After he had stated if it had not been for him I should not have been alive at that time when he spoke to me that day, I listened to him, and I then asked him what possessed him or what did you want to kill me for? Had you men not been well-fed; have you not been well-treated?" He said yes, he did not know, he thought it was merely a crazy hallucination that came into their heads by St. Clair telling them that all California vessels as a rule carried their outward freight back home in money, which would be perhaps $12,000 or $14,000, and that money they wanted to take, and St. Clair planned the whole thing how it was to get that money, and that particular night the time was set at 10 o'clock to commence on the 13th of January. Hansen said that St. Clair had a hatchet of his own, a new hatchet of his own, which he bought in New Castle, which he gave to Sparf."

Specification number 18. The court erred in overruling the objection of the defendants to the question propounded to the witness Edward Larsen, and in allowing the answer thereto:

"Q. What did he say, if anything, at that time to you?"

158 "A. He said that Hansen wanted to take the wheel."

Specification number 19. The court erred in overruling the objection of the defendant to the following question propounded to the witness, Edward Larsen, and in allowing the answer thereto:

"Q. State what it was that was said."

"A. Hansen said he went down and attacked the royal sheet. St. Clair went aft and called the second mate forward. As he came forward the second mate looked up at the royal. The royal was flapping. At the same time St. Clair had an axe in his hand, and he said, 'Now is the time, boys,' and he struck him. The second mate fell and grabbed hold of Hansen's coat and hitting him all to pieces. Hansen and Sparf were standing on the other side of gangway, looking at it. Hansen was scared, and so was Sparf, and Hansen said to Sparf, 'Let us take the man and throw him overboard,' and Herman took hold of the man's shoulders and Hansen by the feet, and they took the man and threw him over the side."

Specification number 20. The court erred in overruling the defendant's objection to the following question propounding to the witness Pandy Zacharia, and in allowing the answer thereto:

"Q. Did you see St. Clair that night on the port side of the ship throw some clothes overboard?"

"A. I saw him do that."

Specification No. 21. The court erred in overruling the objection of the defendants to the following question, propounded to the witness, Ah Hong, and in allowing the answer thereto:

"Q. Did you give that hatchet to St. Clair that night?"

"A. St. Clair asked me to lend him the axe. I said, 'What do you want it for?' He said, 'I want it to chop wood.' St. Clair took the axe away."

159 Specification No. 23. The court erred in permitting the certificate of registration of the bark Hesper to be introduced and allowed in evidence.

Specification No. 24. The court erred in permitting page 4 of the registry book endorsed on the back of it "543" copies of registors, May 13th, 1891, March 18th, 1893, custom-house, to be introduced in evidence.

Specification No. 25. The court erred in permitting page 12 of that book to be allowed and introduced in evidence.

Specification No. 26. The court erred in charging the jury as follows:

"What, then, is murder? There are only two kinds of felonious homocide known to the laws of the United States. One is murder and the other is manslaughter."

Specification No. 27. The court erred in charging the jury as follows:

"By common law murder is the unlawful killing of a human being in the peace of the State, with malice aforethought, either express or implied.

"Malice, then, is an element in the offense, and discriminates it from the other crime of felonious homocide which I have mentioned, to wit:

"Manslaughter; that is, malice, express or implied, discriminates murder from the offense of manslaughter."

Specification No. 28. The court erred in charging the jury as follows:

"Manslaughter is the unlawful killing of a human being without malice, either express or implied."

Specification No. 29. The court erred in charging the jury as follows:

"I do not consider it necessary, gentlemen, to explain it further,

160 for if a felonious homocide has been committed, of which you are to be the judges from the proof, there is nothing in this case to reduce it below the grade of murder. In other words, it may be in the power of the jury, under the indictment by which these defendants are accused and tried, of finding them guilty of a less crime than murder—to wit, manslaughter, or an attempt to commit murder; yet, as I have said in this case, if a felonious homocide has been committed at all, of which, I repeat, you are the judges, there is nothing to reduce it below the grade of murder."

Specification No. 30. The court erred in charging the jury as follows:

"When you retire to your jury room you will select one of your number foreman. After you have deliberated upon the case and agreed upon a verdict you will return into court. The form of your verdict will be, if you find the defendants guilty, 'We, the jury, find the defendants guilty of murder.' If you find them not guilty, your verdict will be, 'We, the jury, find the defendants not guilty;' or if you find one guilty, and not the other, your verdict will be accordingly."

Specification number 31. The court erred in its response to the following question, propounded by a juror:

JUROR. "I am the spokesman for two of us. We desire to clearly understand the matter. It is a barrier in our mind to our determining

the matter. The question arising amongst us is as to aiding and abetting. Furthermore, as I understand, it must be one thing or the other; it must be either guilty or not guilty?"

161 "The COURT. Yes, under the instructions I have given you; I will read them to you again, so as to be careful, and that you may understand.

"Manslaughter is the unlawful killing of a human being without malice, either express or implied. I do not consider it necessary to explain it further. If a felonious homocide has been committed by either of the defendants, of which you are to be the judges from the proof, there is nothing in this case to reduce it below the grade of murder."

Specification number 32. The court erred in charging the jury in response to this question of a juror:

"JUROR. A crime committed on the high seas must have been murder, or can it be manslaughter?"

"The COURT. In a proper case it may be murder or it may be manslaughter, but in this case it cannot be properly manslaughter, as I have said; if a felonious homocide has been committed, the facts of the case do not reduce it below the murder."

Specification number 33. The court erred in charging the jury in response to this question of a juror:

"JUROR. Then there is no other verdict we can bring in except guilty or not guilty?"

"The COURT. In a proper case a verdict for manslaughter may be rendered, as the district attorney has stated; and even in this case you have the physical power to do so, but as one of the tribunals of the country a jury is expected to be governed by law, and the law it should receive from the court."

162 Specification number 34. The court erred in refusing to instruct the jury, as requested by the defendants, as follows:

"In all criminal causes the defendant may be found guilty of any offense the commission of which is necessarily included in that with which he is charged in the indictment, or the defendant may be found guilty of an attempt to commit the offense so charged, provided that such attempt be itself a separate offense."

Specification number 35. The court erred in refusing to instruct the jury, at the request of the defendants, as follows:

"That under an indictment charging murder the defendant may be convicted of murder, of manslaughter, or an attempt to commit either murder or manslaughter."

Specification number 36. The court erred in refusing to instruct the jury, at the request of the defendants, as follows:

"That under the indictment in this case the defendants may be convicted of murder or manslaughter, or of an attempt to commit murder or manslaughter, and if after a full and careful consideration of all the evidence before you you believe beyond a reasonable doubt that the defendants are guilty either of manslaughter or of an assault with intent to commit murder or manslaughter you should so find your verdict."

Specification number 37. The verdict of the jury was erroneous.

163 Specification number 38. The court erred in denying defendants, motion for a new trial.

Specification number 39. The court erred in permitting any evidence whatever as to acts or declarations of alleged conspirators, for the reason that no conspiracy is charged in the indictment.

Specification 40. The place of execution is not definitely or at all specified in the judgment of the court.

In order that the foregoing assignment of errors may be and appear of record, the plaintiffs in error present the same to the court and pray that such disposition be made thereof as in accordance with law and the statutes of the United States in such cases made and provided, and pray an order that the judgment of the circuit court of the United States in and for the northern district of California be reversed and that they be granted a new trial herein.

F. J. PIERCE,
JAMES H. SMITH.
*Counsel for Plaintiffs in Error.*

(Endorsed): Filed November 22d, 1893. W. J. Costigan, clerk.

164 *Order granting writ of error.*

At a stated term, to wit, the July term A. D. 1893, of the circuit court of the United States of America, of the ninth judicial circuit in and for the northern district of California, held at the court-room in the city and county of San Francisco on Thursday, the 23d day of November, in the year of our Lord one thousand eight hundred and ninety-three. Present: the honorable Joseph McKenna, circuit judge.

THE UNITED STATES OF AMERICA
*v.*
HERMAN SPARF AND HANS HANSON. } No. 2173.

On motion of James F. Smith, esq., of counsel for defendants, Herman Sparf and Hans Hanson, having duly filed his petition for a writ of error to the United States Supreme Court, together with an assignment of errors within due time;

It is hereby ordered that a writ of error to the United States Supreme Court be granted to said defendants Herman Sparf and Hans Hanson, and that a certified transcript of the record and proceedings in said cause be transmitted by the clerk of this court to the Clerk of the Supreme Court of the United States, and that during the pendency of said writ of error all proceedings in this court herein shall be stayed until the determination of said writ of error in said Supreme Court of the United States.

165 *Certificate to transcript.*

In the circuit court of the United States, ninth judicial circuit, northern district of California.

THE UNITED STATES OF AMERICA, PLAINTIFF,
*vs.*
HERMAN SPARF AND HANS HANSON, DEFENDANTS. } No. 2173.

I, W. J. Costigan, clerk of the circuit court of the United States of America of the ninth judicial circuit, in and for the northern district of California, do hereby certify the foregoing one hundred and sixty-four

written pages, numbered from 1 to 164, inclusive, to be a full, true, and correct copy of the record, papers, and proceedings in the above and therein entitled cause, as the same remain of record and on file in the office of the clerk of said court, and that the same constitute the return to the annexed writ of error.

In testimony whereof I have hereunto set my hand and affixed the seal of said circuit court this 12th day of December, A. D. 1893.

[SEAL.] W. J. COSTIGAN,
*Clerk U. S. Circuit Court, Northern District of California.*

166 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judge of the circuit court of the United States for the northern district of California, greeting:

Because in the record and proceedings, and also in the rendition of the judgment of a plea which is in the said circuit court before you, between Herman Sparf and Hans Hanson, defendants and plaintiffs in error, and the United States, plaintiff and defendant in error, a manifest error hath happened to the great damage of the said Herman Sparf and Hans Hanson, as by their complaint appears, and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at the city of Washington, District of Columbia, United States of America, on Monday, January 15th, 1894, next, in the said Supreme Court, to be there and then held, that the record and proceedings aforesaid be inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States should be done.

Witness the Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 23d day of November, in the year of our Lord one thousand eight hundred and ninety-three, and of the Independence of the United States the one hundred and eighteenth.

[SEAL.] W. J. COSTIGAN,
*Clerk of the Circuit Court of the United States,*
*Ninth Circuit, Northern District of California.*

The above writ of error is hereby allowed.

J. MCKENNA,
*Judge of the Circuit Court of the United States,*
*Ninth Circuit, Northern District of California.*

167 Service of the within writ of error and receipt of a copy thereof is hereby admitted this 23d day of November, 1893.

CHARLES A GARTER,
*Attorney for Plaintiff and Defendant in Error.*

The answer of the judges of the circuit court of the United States of the ninth judicial circuit, in and for the northern district of California.

The record and all proceedings of the plaint whereof mention is within made, with all things touching the same, we certify under the seal of our said court to the Supreme Court of the United States, within mentioned at the day and place within contained, in a certain schedule to this writ annexed as within we are commanded.

By the court.

[SEAL.] W. J. COSTIGAN,
*Clerk.*

(Indorsed:) 2173. United States circuit court, 9th circuit, northern dist. of California. United States of America vs. Herman Sparf and Hans Hanson. Writ of error. Filed November 23d, 1893. W. J. Costigan, clerk.

168 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the United States of America, greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be held at the city of Washington, in the District of Columbia, on Monday, the 15th day of January, A. D. 1894, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the northern district of California, wherein Herman Sparf and Hans Hanson are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against said plaintiffs in error, as in the said writ of error mentioned, should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the honorable Joseph McKenna, judge of the circuit court of the United States of America, ninth circuit, northern district of California, this 23d day of November, A. D. 1893, and of the Independence of the United States the one hundred and eighteenth.

J. MCKENNA,
*Circuit Judge.*

169 Service of within citation by copy admitted this 23d day of November, A. D. 1893.

CHARLES A. GARTER,
*Attorney for Plaintiff and Defendant in Error.*

(Indorsed:) In the Supreme Court of the United States. Herman Sparf and Hans Hanson, plaintiffs in error, vs. United States, defendant in error. (Original) citation. Filed November 23d, 1893. W. J. Costigan, clerk U. S. circuit court, northern district of California.

(Indorsed on cover:) Term No. 1085. Case No. 15469. Herman Sparf and Hans Hanson, plaintiffs in error, vs. The United States. N. California C. C. U. S. Filed December 19, 1893.

Office Supreme Court U. S.
FILED.
MAR 5 1894
JAMES H. McKENNEY,
CLERK.

No. 1,085.

# IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

HERMAN SPARF AND HANS HANSEN,
PLAINTIFFS IN ERROR.

*vs.*

UNITED STATES, DEFENDANT IN ERROR.

## BRIEF OF THE PLAINTIFFS IN ERROR.

J. F. SMITH AND F. J. KIERCE,
*Counsel for Plaintiffs in Error.*

GEO. SPAULDING & CO., PRS., 414 CLAY ST., SAN FRANCISCO.

# IN THE SUPREME COURT

OF THE

# UNITED STATES

No. 1085.

HERMAN SPARF AND HANS HANSEN,

PLAINTIFFS IN ERROR,

*vs.*

UNITED STATES,

DEFENDANT IN ERROR.

## BRIEF OF THE PLAINTIFFS IN ERROR.

*Statement of the Case.*

The plaintiffs in error were brought to trial in the Circuit Court of the United States for the Ninth Circuit, on the 16th day of August, 1893, under an indictment for murder, presented against them in the District Court of the United States for the Northern District of California, and remitted to said Circuit Court for trial. In the indictment the plaintiffs in error were jointly charged with Thomas St. Clair, but before trial they demanded and were granted a separate trial.

The indictment charges that on the 13th day of January, 1893, Thomas St. Clair, Herman Sparf and Hans Hansen, did, on the high seas, on the American bark Hesper, in and upon one Maurice Fitzgerald, piratically, willfully, feloniously, and of their malice aforethought, make an assault, and with an unknown weapon, in the hands of one of them, did strike, beat and mortally wound the said Maurice Fitzgerald, and did then and there cast him into the sea and drown him—from which mortal wound, casting and drowning, it is alleged that Fitzgerald then and there instantly died. It is further alleged that the plaintiffs in error and Thomas St. Clair did in this manner him, the said Maurice Fitzgerald, piratically, willfully, feloniously and with malice aforethought, kill and murder. (Trans., folios 1 to 5.)

The indictment was remitted by the District Court to the Circuit Court for trial on the 5th of May, 1893, before which plaintiffs in error were arraigned on the 10th of May, 1893, and pleaded not guilty with the privilege of withdrawing their plea.

On the 24th of May, 1893, the plea of "not guilty" was withdrawn and a demurrer to the indictment interposed upon the ground that it did not state facts sufficient to constitute a public offense and upon the further ground that it was uncertain in as much as it did not allege upon what portion of the high seas the offense was committed and did not state which one of the defendants committed the assault or inflicted the mortal wounds or in fact did the killing. (Trans., folio 12.)

This demurrer was overruled on the same day that it was filed and the plaintiffs in error thereupon pleaded "not guilty." (Trans., folio 13.)

The plaintiffs in error were brought on to be tried at the "July Term" of the Circuit Court—that is, the term commencing on the second monday of July, 1893, and ending on the fourth Monday of November, 1893.

During the term at which the plaintiffs in error were tried no order of Court was ever made or entered directing the selection of names to be placed in a box from which trial jurors might be drawn. At the previous term of the Court however, to wit, on the 8th of May, 1893, an order was made directing that the commissioner theretofore appointed for that purpose select the names of not less than 150 persons possessing the necessary qualifications and place such names in a box from which they might be drawn—the persons whose names were so drawn to serve as trial jurors of the Court.

Three hundred names were not placed in the box during the term at which the plaintiffs in error were tried, nor at any time during the previous term—although the 150 names placed in the box at the previous term added to the names left over in the box from the previous term to that made 300 names altogether. (Trans., folios 57 and 58.)

From this box, to which 150 names had been added in the previous May, 100 names were drawn on the 11th of July, 1893, and the marshal thereafter summoned the persons so drawn to act as trial jurors.

The trial of the plaintiffs in error began on the 16th day of August, 1893, and was concluded on the 25th of August, 1893, by a verdict of guilty of murder, upon which, after a motion for a new trial had been denied, judgment of death was pronounced against the plaintiffs in error on the 18th of September, 1893.

From the proceedings had upon the indictment and at the trial and from the verdict and judgment had thereon, Herman Sparf and Hans Hansen have been granted a writ of error to this Court.

*Specification A.*

The Court erred in overruling the demurrer of plaintiffs in error to the indictment. (Trans., folios 1, 2, 3 and 12.)

The indictment under which Hans Hansen and Herman Sparf were tried, found guilty of murder and sentenced to death, does not charge them, or either of them, with the crime of murder. It charges, first, that Thomas St. Clair, Herman Sparf and Hans Hansen did upon Maurice Fitzgerald, piratically, willfully, feloniously and of malice aforethought, make an assault; second, that with a weapon unknown held in the hands of one of them also unknown, several grievous and mortal wounds were piratically, willfully, feloniously and with malice aforethought inflicted on Maurice Fitzgerald; third, that Thomas St. Clair, Herman Sparf and Hans Hansen did cast, plunge, sink and drown Maurice Fitzgerald in the sea—of which mortal wounds, casting, sinking, plunging and drowning it is alleged that Maurice Fitzgerald then and there instantly died, and so the grand jurors do say that said Thomas St. Clair, Herman Sparf and Hans Hansen did, in the manner and form aforesaid, willfully and with malice aforethought, kill and murder Maurice Fitzgerald.

An analysis of the indictment shows: 1st. That there was a felonious, willful, piratical, malicious assault, from which it does not appear that any injury resulted. 2d. That with a weapon held in the hands of one of the parties charged there was a piratical, willful, malicious and felonious assault, which produced mortal wounds; and 3d: That the parties charged cast, sunk, plunged and drowned Maurice Fitzgerald in the sea, which casting, plunging, sinking and drowning it is not alleged was piratical, willful, felonious, or with malice aforethought, but from which and from the mortal wounds it is alleged he instantly died, although it is difficult to understand how Maurice Fitzgerald could have instantly died from both the wounds and the drowning.

The indictment does not allege that there was any conspiracy or concert of action between any of the parties charged, nor does it allege that any of them aided, abetted, countenanced, counseled, or encouraged the one who inflicted the wounds from which Maurice Fitzgerald instantly died. To charge all for the acts of one, it should have been alleged that there was

a conspiracy or concert of action among all to do the things from which death resulted, or that the others aided, abetted, encouraged, counseled or countenanced the one who did them.

The casting, sinking, plunging and drowning of Maurice Fitzgerald in the sea by the parties charged is nowhere alleged to have been done either feloniously or piractically, or willfully, or with malice aforethought, or with intent to kill or murder Maurice Fitzgerald.

In fact, none of the acts alleged are stated to have been done with the intent to kill or murder. Having attempted to allege the acts which resulted in a killing, the pleader, to make that killing murder, should have alleged that the acts were done with intent to kill and murder. The acts might be felonious, or piratical, or willful, or with malice aforethought, or all of them combined, and still not be done with intent to kill or murder.

The indictment is not aided by the allegation, which is practically to the following effect, viz.: "And so or therefore the "Grand Jurors do say that Thomas St. Clair, Herman Sparf "and Hans Hansen, in the manner and form aforesaid, did "piratically, feloniously, willfully and with malice aforethought, "kill and murder Maurice Fitzgerald."

This is substantially the concluding allegation of the indictment, and in no way cures its inherent defects because it is avowedly the deduction and inference drawn by the Grand Jurors from the facts previously alleged.

If the facts previously stated are not sufficient to constitute the crime of murder, the allegation in the indictment that they do is not binding on the Court, nor does it charge the plaintiffs in error with the crime of murder. The allegation is simply a deduction from certain premises, and if those premises fall the deduction drawn from them must fall with them.

The indictment probably well charged an assault, but did not charge murder.

*Ball* vs. *United States*, 140 U. S., 118–136.

*Specifications B, C and E.*

The Court erred in denying and overruling the challenge of plaintiffs in error to the entire panel and to the persons summoned to act as trial jurors, and to the twelve persons, and each of them, placed in the box to be examined touching their qualifications to act as jurors, and to the swearing in of the twelve persons who tried said cause.

(Trans., folios 57, 58, 59.)

*Specification D.*

The Court erred in compelling the plaintiffs in error against their objection to exercise the right of peremptory challenge immediately upon the conclusion of the examination of each juror touching his qualifications and in not permitting them to examine all twelve men before exercising their peremptory right of challenge.

A. The plaintiffs in error claim that at any time before twelve men had been examined as jurors to try the case they had the right to exercise a peremptory challenge as to any of them, and that they were stripped of the chief value of the privilege of the peremptory challenge by being compelled to exercise it immediately after each talesman was examined touching his qualifications. The ruling of the Court gave to the plaintiffs in error only the answers and demeanor of the talesman as a guide for the exercise of their right and took away from them the invaluable advantage of comparison and the relations of one man's personalty to that of another. A defendant in a criminal prosecution might be entirely willing to be tried by twelve men of great force of character and yet not be willing to be tried by twelve men, ten of whom might be dominated by the other two.

In other words, before exercising a peremptory challenge a defendant has a right to know not only the relation the prospective juror bears to the case and to him, but also the relation such juror bears to every other prospective juror.

*Hunter* vs. *Parsons*, 22 Mich., 96–101. (Citing 4 Bl. Com., 353.)

*Sterling Bridge Co.* vs. *Pearl*, 80 Ill., 251–254.

*Taylor* vs. *Western Pac. R. R. Co.*, 45 Cal., 323.

The rule permitting the examination of the entire twelve men before a party is required to exercise a peremptory challenge is one which obtains in all civil cases, how much more ought such to be the rule in cases where the issue to be determined is one of life or death.

As was well said in *Lamb* vs. *The State:* "The mode adopted "gave no opportunity for comparison and choice between "jurors, and little opportunity for that observance of each "juror apparently essential to the exercise of the right."

*Lamb* vs. *The State*, 36 Wis., 424, 425, 426, 427.

B. Plaintiffs in error insist that in the State of California, in which the Circuit Court of 9th Circuit is held, the practice

is well establisned that a defendant must be allowed to examine the whole twelve before exercising his right of peremptory challenge as to any.

*People* vs. *Scoggins*, 37 Cal., 676–681.
*People* vs. *Jenks*, 24 Cal., 11–13.
*People* vs. *Iams*, 57 Cal., 115.

The practice in United States Courts in the matter of selecting and empannelling juries must conform as far as may be practicable to existing laws in the particular States.

*U. S.* vs. *Douglass*, 2 Blachf., 207–213; 2 U. S. Stat. at large, 82; 5 U. S. Stat. at large, 394; Revised Stat., Sec. 800.

*Specifications 5 and 6.*

The Court erred in overruling the objection of the plaintiffs in error to the following questions propounded to the witness Edward Larsen, and in permitting the answers thereto, as again follows:

"Q. Did you see St. Clair during that watch?

"A. Yes, sir; at twenty minutes past ten; the second mate was then aft.

"Q. What, if anything, did St. Clair say to the second mate?

"A. St. Clair said to the second mate that there was something carried away overboard, and the second mate followed him forward. I afterwards heard the second mate sing out twice and the dog barked twice." (Trans., folios 77–78.)

The questions to this witness which were objected to by the plaintiffs in error, were directed to that point of time at which it was claimed by the prosecution that Fitzgerald had been foully dealt with. (Trans., folios 61–103.) It was not claimed and as a matter of fact neither of the plaintiffs in error were present at the time. (Trans., folio 78.)

What St. Clair did or said therefore was not material, nor could the plaintiffs in error be affected by his conduct or statements in their absence.

*Specifications 7 and 8.*

The Court erred in overruling the objections of plaintiffs in error to the questions propounded to the witness, Edward Larsen, and in permitting the answers thereto, as follows:

"Q. Were you ever present, before the time the mate dis-
"appeared, when the subject of killing the mate or the captain,

" or anybody on board the Hesper, was discussed, when Her-
" man Sparf, Hans Hansen and Thomas St. Clair was present?
"A. Yes, sir.
"Q. State what was said?
"A. It was one day, sir, when the captain was gone into
" the cabin, sir. I heard Herman Sparf call the captain a son
" of a bitch, and he said he had to be killed, and we would be
" our own boss, and take the ship from him, and take the ship
" and go ashore, sir. I heard Herman Sparf say that in the
" forecastle. I asked Herman Sparf how he would kill the
" captain, and St. Clair said Larsen (meaning me) does not
" understand the business." (Trans., folios 78 and 79.)

Had the plaintiffs been charged in the indictment with a conspiracy to carry into execution an unlawful enterprise, in the pursuit of which unlawful enterprise, and in the carrying out of which conspiracy the second mate was killed, this testimony might have been material and competent, but it was not material or competent in this case.

Even if the indictment here could be held under any possible construction to charge the plaintiffs in error with the murder of the second mate, evidence tending to show or showing enmity towards the captain, or an intention to kill him, certainly cannot be held to be evidence showing or tending to show that the plaintiffs in error had any intention to kill the mate.

Can it be argued that evidence tending to show that a defendant intended to kill one man is evidence that he murdered another, unless a conspiracy be alleged?

*Pettibone* vs. *U. S.*, 148 U. S., 197.
*Brown* vs. *U. S.*, 14 Sup. Ct. Rep., 37.

*Specifications 9, 10, 11.*

The Court erred in overruling the objection of plaintiffs in error to the questions propounded by the prosecution to the witness Thomas Green, and in permitting the answers thereto as follows:

" Q. Did you see any blood on St. Clair when Hansen and
" Sparf were near him?
" A. I never saw any blood on him.
" Q. At the time you met St. Clair coming out of the fore-
" castle to which you have reference, I will ask you what his
" appearance was as to whether there was any blood upon him
" or any part of his person?
" A. I don't know what clothes he had on sir; I never saw
" any blood on him at that time.

"Q. Did you that night see any blood on him?

"A. I did, sir, that night, there was blood on his hands. He "was on the port side of the vessel. Hansen and Sparf were "then on the starboard side." (Trans. folios 82, 83, 84.)

These questions were aimed at a time some two hours after it is claimed that Maurice Fitzgerald had been killed. The condition of St. Clair was material only in so far as it might affect St. Clair himself. His condition, his acts, his statements, could at no time bind the plaintiffs in error in the absence of an allegation of conspiracy unless knowledge of his condition and acts was brought home to them or the statements were made in his presence. Even if a conspiracy had been alleged and proven, the acts, condition or statement of one conspirator after the consummation of the conspiracy or its abandonment are not competent or material evidence against the others.

*Brown* vs. *U. S.*, 14 Sup. Ct. Rep., 37.

*Specifications 14, 15, 15 1-2, 16, 17, 18, 19.*

These specifications of error are directed to the ruling of the Court in admitting evidence of statements and alleged confessions made by Hans Hansen after the death of Maurice Fitzgerald, and while he was in irons in confinement and accused of the crime of murder.

These particular specifications of error with the accompanying evidence will be found at Trans., folios 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105.

Plaintiffs in error contend:

1. That there can be no voluntary statement, no free, open confession while a defendant is in confinement in irons, under an accusation of having committed a capital offense.

The whole question turns upon what definition shall be given to the term "voluntary." Does it mean simply the absence of threats made against the prisoner by a third person—the absence of inducement or reward or the hope to escape, or mitigate punishment held out by a third party, or has it a broader signification? Are not the sense of his own awful position, the knowledge that a chain and net-work of circumstances have arrayed the opinion of his fellows against him, the feeling that suspicion points her terrifying finger at him, the hope that an admission may mitigate his punishment, or bring about a more satisfactory conclusion to his condition—the shadows of the gallows in which stands bound hand and foot as potent threats, as powerful inducements, as substantial hopes of reward as any which may be made or offered through

the agency of a third person? Do they not affect his judgment just as strongly and appeal to his heart just as powerfully? Let the long list of false confessions of men, strong in body and health of mind, make answer.

The confession which comes from a contrite heart or the sting of a remorseful conscience is one thing—that which only comes when the gyves have been fastened on the wrists and the chains have been bound about the feet is something different both as to character and in value.

*Specifications 20 and 21.*

The Court erred in overruling the objection of plaintiffs in error to the questions propounded to the witness Pandy Zackaria and Ah Hong, and in permitting the answers thereto, as follows:

"Q. (Mr. Garter.) I want to ask this witness if he did not "see St. Clair throw some clothes overboard on that night on "the port side of that ship, as a matter of cross-examination?

"A. I seen him do that." (Trans., folio 107.)

"Q. (To Ah Hong by Mr. Garter.) Did you give that "hatchet to St. Clair that night?

"St. Clair asked me to lend him the ax. I said what you "want it for. He said I want it to chop wood. St. Clair took "the ax away." (Trans., folio 110.)

As to these specifications of error we refer the Court to the argument on specifications 5 and 6 and specifications 9, 10, 11.

*Specifications 29, 30, 31, 32, 33, 34, 35, 36.*

These specifications of error arise out of the instructions given by the Court to the jury to the effect that the plaintiffs in error must be either found guilty of murder or acquitted, and out of the refusal of the Court to give the instructions to the jury requested by the plaintiffs in error, that under the indictment the defendants might be convicted of murder, of manslaughter, of an attempt to commit murder, or of an assault. (Trans., folios 122, 128, 129, 130, 131, 132, 133.)

The Court specifically instructed the jury that if a felonious homicide had been committed, that there was nothing in the case to reduce it below the grade of murder. (Trans., folio 122.)

The plaintiffs in error specifically requested that the Court instruct the jury, first, that the defendants might be guilty of any offense necessarily included in that which was charged in the indictment, or of an attempt to commit the offense charged,

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# In the Supreme Court of the United States.

OCTOBER TERM, 1893.

HERMAN SPARF AND HANS HANSON, plaintiffs in error, v. THE UNITED STATES OF AMERICA. } No. 1085.

THOMAS ST. CLAIR, PLAINTIFF IN error, v. THE UNITED STATES OF AMERICA. } No. 1062.

## SUPPLEMENTAL BRIEF FOR THE UNITED STATES.

# In the Supreme Court of the United States.

OCTOBER TERM, 1893.

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| HERMAN SPARF AND HANS HANSON, plaintiffs in error, v. THE UNITED STATES OF AMERICA, defendant in error. | No. 1085. |
| THOMAS ST. CLAIR, PLAINTIFF IN error, v. THE UNITED STATES OF AMERICA, defendant in error. | No. 1062. |

Upon suggestion by the plaintiffs in error in these causes of a diminution of the record, in the omission from the printed transcript of certain instructions requested by defendant and refused by the court, a certified transcript of the instructions, together with the action of the court thereon, have been printed and filed with the record.

It is insisted, on behalf of plaintiffs in error, that these instructions, with the alleged action of the court thereon, shall be received and considered by this court as though they were embraced in the bill of exceptions.

The ground of this insistance being that, by virtue and under the authority of the penal code of California, the same effect should be given by the appellate court to instructions refused by the court, and having such refusal indorsed thereon by the judge, as though such action of the court was duly certified and presented in a formal bill of exceptions.

It is true, to be sure, that section 1176 of the penal code of California does provide:

> When written charges have been presented, given, or refused, or when the charges have been taken down by the reporter, the questions presented in such charges need not be excepted to or embodied in a bill of exceptions, but the written charges or the report with the indorsements, showing the action of the court, form part of the record, and any error in the decision of the court thereon may be taken advantage of on appeal in like manner as if presented in a bill of exceptions.

It is equally true that section 914 Revised Statutes of the United States provides:

> The practice, pleadings, and forms and modes of proceeding in civil cases other than equity and admiralty cases in the circuit and district courts, shall conform as near as may be to the practice, pleadings, and forms and modes of proceeding existing at the time in like causes in the courts of record of the State, within which circuit or district courts are held, any rule to the contrary notwithstanding.

This is the only statute of the United States relating to this subject, and it is limited in its operation to *civil* causes and does not extend to *criminal* proceedings under which these two causes fall.

It is manifest, too, that the California statute was not intended to apply to any other than the State courts, for it provides, not only for proceedings in the lower courts, but for such as may be had on appeal to the supreme court of appeals of that State.

But even if section 914 of the Revised Statutes embraced criminal as well as civil causes, its operation must be limited exclusively to proceedings had in the district and circuit courts on the trial of causes there and could not be extended to the means that might be employed of enforcing or reviewing in the Supreme Court of the United States the decisions of the inferior courts.

In *Chateaugay Iron Co.* v. *Petitioner* (128 U. S., 553 and following), this court, construing section 914 Revised Statutes, after reviewing certain decisions of this court, said:

> In harmony with the foregoing decisions, we are of opinion that section 914 does not extend to the means of enforcing or revising a decision once made by the circuit court. * * * The object of section 914 was to assimilate the form and manner in which the parties should present their claims and defense in the preparation for the trial of suits in the Federal courts to those prevailing in the courts of the State. As we have seen, it does not include State statutes requiring instructions to the jury to be reduced to writing, or those which permit such instructions and certain papers read in evidence to be taken by the jury when they retire, or those which require the jury to be directed, if they return a general verdict, to find specially upon particular questions of fact involved in the issues. And as it does not apply to a motion for a new trial, nor affect the power of the circuit court

to grant or refuse a new trial at its discretion, so it does not cover any other means of enforcing or revising a decision once made by the circuit court.

See, too, opinion of Mr. Justice Gray in *Andes* v. *Slauson*. (130 U. S., 438.)

It is clear, then, that neither under the Revised Statutes of the United States or under the penal code of California can authority be found for requiring this court to recognize the instructions or the alleged indorsements thereon as parts of the records in these causes as though introduced therein and made parts thereof by a bill of exceptions.

## ON THE MERITS.

The briefs of the plaintiffs in error in these causes were received after the brief for the United States had been printed and filed; and for that reason the views presented in the briefs for plaintiffs in error are not referred to in the brief for the Government.

In the brief in No. 1062 (p. 10)—

Exception 1. It is urged as a ground of demurrer that the indictment does not charge St. Clair with the crime of murder.

Without charging in specific terms a "conspiracy," the indictment does charge that the three persons, with a certain instrument, then and there held in the hands of one of them, but which particular one was to the grand jurors unknown, did, on the 13th of January, 1893, on the high seas, etc., willfully, feloniously, and with malice aforethought, strike and beat the said Fitzgerald, giving to him dangerous and mortal wounds; and did then and there,

to wit, at the time and place last mentioned, him, the said Fitzgerald, cast and throw from and out of the said vessel into the sea, and plunge, sink, and drown him, the said Fitzgerald, in the sea aforesaid. Of which said mortal wounds, casting, throwing, plunging, sinking, and drowning, the said Fitzgerald, in and upon the said high seas, out of the jurisdiction of any particular State of the United States of America, then and there instantly died.

While this indictment does not charge that the defendants struck and beat Fitzgerald and cast him into the sea with the intent to kill him, it does charge that these things were done willfully, feloniously, and with malice aforethought, and that is a sufficient charge of intention. (1 Bish. Crim. Law, sec. 426; 2 Wharton Crim. Law, sec. 106.)

The case of *Ball* v. *United States* (140 U. S., 1191), frequently cited by plaintiffs in error in their brief (p. 11) as 118 United States, held that an indictment which failed to allege the time and place of the commission of the crime was defective.

Here the time and place are distinctly averred, but as the body was cast into the sea and could not be produced or inspected, the *corpus delicti* is dispensed with, as shown in our brief.

The other matters have been sufficiently dwelt upon in the brief heretofore filed for the Government.

HOLMES CONRAD,
*Assistant Attorney-General.*